AN

ESSAY

ON

MILITARY LAW,

AND THE

PRACTICE OF

COURTS MARTIAL.

BY

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PREFACE.

THE following Treatiſe is the joint reſult of the Author's reading, and enquiry into every ſource of information, relative to the Military Law of this country, and of his profeſſional experience in the Forms and Practice of General Courts-Martial, during a period of ſeveral years, in which he has had the honour of holding his Majeſty's commiſſion of Judge-Advocate for this part of the United Kingdom. In theſe latter years, in which, from the peculiar circumſtances of the times, Britain, under the regulation of a ſevere but neceſſary policy, has become an armed nation, the Military Law has obtained a more extenſive field of operation than at any former period of the national annals. At no time, therefore, was it ever ſo neceſſary that its doctrines ſhould be thoroughly underſtood,

underſtood, and the knowledge of its regulations generally diffuſed, as when daily occaſion requires their application and enforcement.

In the compoſition of this Treatiſe, the Author has endeavoured to ſupply a want, which he felt himſelf, and which he believes will be acknowledged by all who have been deſirous of obtaining a thorough acquaintance with the ſubject; namely, that the Military Law has never been ſyſtematically treated, or with any reference of its doctrines to the general principles either of Civil Juriſprudence or of the Law of Nations. We have hitherto had nothing written expreſsly upon the ſubject by any profeſſional Lawyer; and in the ſhort incidental account which is given of the *Military State* by Sir William Blackſtone, we have to regret that he has drawn his notions of the Martial Law from what it was in the days of Hale and Coke; and, with

with an inadvertency ſcarcely excuſable in a writer who has ſo profoundly ſtudied the conſtitution as well as the juriſprudence of his country, applied theſe notions to the Military Law as it exiſts at preſent. It became, therefore, an object of ſome importance, to correct this palpable miſrepreſentation, and to exhibit the Military Law as it truly is, a part of the laws of the land, enacted by the ſame authority, enforced by the ſame power, and reſting on the ſame foundation of juſtice, good policy, and humanity. The hiſtorical deduction in the beginning of this Treatiſe is principally directed to the removal of theſe prejudices; as, by a regular detail of the progreſs of the Military Law in the various periods of our hiſtory, it is ſeen to keep pace with the conſtitution, to have partaken in all its alternate changes, and to have attained at length the ſame character of a ſyſtem wiſely calculated to ſecure alike the rights, and to enforce the duties of the ſubject.

The

The practical part of this work is particularly addreſſed to the Gentlemen of the Military Profeſſion; to whom it is of importance to be well acquainted not only with the forms and procedure in the trial of crimes by Court-Martial, but with the general doctrines of the law of evidence, which apply equally to the cognizance of crimes before a Military, as before a Civil tribunal. In any matters regarding the practice of the Military Courts which appeared to the Author doubtful, he availed himſelf of the knowledge of thoſe who were beſt qualified to reſolve his doubts: And it would be a failure in juſtice as well as in gratitude, not to acknowledge the uſeful information which has been readily and politely furniſhed him by Sir Charles Morgan, Judge-Advocate General, on all points on which he had occaſion to conſult him.

CON-

Page.

INTRODUCTION, - - - - 1

CHAP. I.

Rise and Progress of the Military Law in England, 31

SECT. I.

From the Conquest to the Reign of Charles I. *ib.*

SECT. II.

From the Reign of Charles I. to the Revolution, 59

CHAP. II.

Of the Authority of Courts-Martial, - 113

CHAP. III.

Of Regimental and Garrison Courts-Martial, 180

CHAP. IV.

Of the Preliminaries to Trial before Courts-Martial, 188

SECT. I.

Of Principals and Accessories, - - *ib.*

SECT. II.

Of the apprehending of Criminals in order to Trial, 202

CHAP. V.

Of the Procedure and Form of Trial before a General Court-Martial, - - - 209

SECT. I.

Of the Accuſation or Charges, - - 209

SECT. II.

Form of conſtituting the Court, - 222

SECT. III.

Arraignment and Trial of the Priſoner, - 238

CHAP. VI.

Of Evidence, - - - 262
Of *viva voce* or Parole Evidence, - - 269
Of Written Evidence, - - - 293
Of Probability, and the weighing of Evidence, 298
How Witneſſes are to be brought, and to give their Evidence, - - - 309

CHAP. VII.

Of the Judgment and Sentence of a Court-Martial, 315

CHAP. VIII.

Of Appeals from a Regimental to a General Court-Martial, - - - - 337

CHAP. IX.

Of Courts of Enquiry, - - 346

CHAP. X.

Of the Office and Duties of a Judge-Advocate, 356

CHAP. XI.

Of the Extenſion of Martial Law in times of Danger to the State, - - - 372

AP-

APPENDIX.

Page.

N° I. Of the ancient Aſſize of Arms, and Commiſſion of Array, - 381

N° II. Of the Offices of High Conſtable and Marſhal, and of the Powers of the Court of Chivalry, - - - 385

N° III. Warrant for holding a General Court-Martial for the Trial of Lord George Sackville, - - - 399

N° IV. Form of a Warrant of a Commander in Chief for holding a General Court-Martial, - - - 404

N° V. Warrant for holding a Court of Enquiry, iſſued by his late Majeſty George II. in 1757, - - - 406

N° VI. Statute paſſed in Ireland, *anno* 1798, for the enactment of Martial Law, - 408

INDEX, - - - 417

Material Correction.

THE Author being miſled by an erroneous Report of the Debate in Parliament in 1786, relative to the incluſion of Officers holding Commiſſion by Brevet, in the Deſcription of ſuch as are ſubjected to the Military Law, has aſſerted, at Page 120 of this Eſſay, that *Half-pay Officers*, as well as Brevet Officers, are included under the general deſcription in the Mutiny Act of "Officers Commiſſioned or in Pay." The Author is now certified on the moſt indiſputable Authority, that in the framing of the Clauſe of the Mutiny Act as it now ſtands, by which all Officers Commiſſioned or in Pay are declared liable to its Authority, it was not the intention of the Legiſlature to include *Officers on Half-pay* in that deſcription; but that Officers holding Brevet Commiſſions without pay, were underſtood to be included.

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AN

ESSAY

ON

MILITARY LAW, &c.

INTRODUCTION.

THE foundation of the Military or Martial Law, is that which is common to all law whatever,—The neceſſity of things. As, from the condition of human nature, no ſtate can ſubſiſt without occaſional warfare, it was an early

Foundation of Martial Law.

A diſcovery

diſcovery in political œconomy, that a body of profeſſional ſoldiers was much better fitted for attaining the ends both of ſecurity and defence, and the achieving of conqueſts, (which a neceſſary policy at times muſt juſtify), than thoſe temporary forces which were raiſed by occaſionally embodying and arming a portion of the citizens *. War is a ſcience which is not to be attained in any meaſure of perfection, without a regular initiation in its elements, and a long and uninterrupted exerciſe of its duties. Moreover, as there is in all liberal profeſſions an *eſprit du corps*, or general character of the body, which is known to have the moſt admirable effect in cheriſhing the laudable, and in ſuppreſſing the faulty or degenerate temperaments of the individuals which compoſe it, the principle of honour, which is the general character of the military order of citizens,

* This ſubject is well illuſtrated by Dr Smith, in his Eſſay on the Wealth of Nations, book v. ch. 1.

citizens, could not have had its full operation, unleſs the military vocation had ſtood diſcriminated from all others, and ranked as a profeſſion which gave to its members an appropriate character and name in civil ſociety.

Expediency, therefore, and the wiſeſt policy, having rendered the military condition a regular profeſſion in all civilized nations, it became neceſſary that this body of men, who, from their number, were capable of becoming either a powerful inſtrument of good, or a formidable engine of evil, ſhould be regulated by certain laws, excluſively adapted and proper to their ſtate. It was requiſite that they ſhould act with regularity, with promptitude, and unanimity; and for that purpoſe it was eſſentially neceſſary that they ſhould feel themſelves perpetually under the ſtricteſt ſubordination, and yield the moſt perfect and abſolute obedience to the command of their leaders. For this pur-

poſe, a ſacrifice of a greater portion of the perſonal liberty of individuals is neceſſary in the profeſſion of a ſoldier, than in any other of the employments of civil life; for without that ſacrifice the army could not for a moment be kept together. Neceſſity, therefore, requires that certain reſtraints ſhould be impoſed on all the ranks of men who compoſe the military force of the ſtate, which are foreign to the condition of other citizens. But when it is conſidered for what a noble end thoſe ſacrifices are made, no leſs than the ſecurity, peace, and welfare of the whole community, and that in themſelves they infringe not on any one eſſential ingredient of rational liberty, or the moſt comfortable enjoyment of life; when it is conſidered that thoſe trivial reſtraints are moſt amply compenſated by the wiſe, humane, and bountiful proviſions that are made for the ſoldier, after he is releaſed with honour from the fatigues of his profeſſion, and the immu-

nities

nities and privileges he enjoys in that title, above all others of his fellow-ſubjects *; there is no man poſſeſſing a liberal or well conſtituted mind, who will complain of the hardſhips of the military profeſſion, far leſs arraign its peculiar regulations of inexpediency or injuſtice.

The chief point in which the condition of a ſoldier differs from that of another citizen with reſpect to perſonal liberty is, that his profeſſional conduct being regulated by the Articles of War, it is in the power of the Sovereign, and entirely at his diſcretion,

* "By Stat. 43. Eliz. c. 3. a weekly allowance is to be "raiſed in every county for the relief of ſoldiers that are ſick, "hurt, and maimed. The Royal Hoſpital at Chelſea is in- "ſtituted for the ſupport of ſuch as are worn out in their "duty. Officers and ſoldiers that have been in the King's "ſervice, are, by ſeveral ſtatutes enacted at the cloſe of ſe- "veral wars, at liberty to uſe any trade or occupation they "are fit for, in any town in the kingdom, (except the two "univerſities), notwithſtanding any ſtatute, cuſtom, or "charter to the contrary. And ſoldiers on Military ſervice "may make nuncupative wills, and diſpoſe of their goods, "wages, and other perſonal chattels, without thoſe forms, "ſolemnities, and expences which the law requires in other "caſes." Blackſtone, b. i. c. 13.

diſcretion, to enact ſuch Articles of War as may to him ſeem moſt expedient for the government of the army, over which he is in that reſpect excluſively the legiſlator. And this power, it is alleged, in the hands of an arbitrary prince, might reduce the condition of a ſoldier to a ſtate of the moſt abject ſervitude. But let it be conſidered, that the Sovereign of Great Britain is in no ſenſe to be regarded as an arbitrary prince or abſolute monarch. His powers and prerogatives are moſt ſpecially defined, and ſo wiſely limited by the laws and conſtitution of the realm, that no prince who occupies the throne of theſe kingdoms, be his individual character and diſpoſition ever ſo prone to tyranny, can materially affect or abridge the liberties of any claſs of his ſubjects. Under the conſtitution of Great Britain, theoretically ſpeaking, there is no ſtanding army; for although in reality the army is not annually diſbanded, yet the annual conſent of parliament is required

quired to keep it in exiſtence. It is therefore, in the nature of things, impoſſible, that any arbitrary enactments, tending to degrade the condition or abridge the liberties of the ſoldiery, could have a longer duration than a year. Moreover, the Mutiny-act, by which the King is authoriſed to frame Articles of war, and which in fact is the code of military law, is the operation of parliament, and not of the Sovereign. It undergoes an annual reviſion in both houſes; it is ſubject to alteration and amendment by the wiſdom of the legiſlature; and thus, by the very limited term of its duration and frequency of its renewal, it is more truly and immediately framed by the people itſelf, than any other of the exiſting ſtatutes of the realm.

It is true, that by the Mutiny-act*, a power is granted to the Sovereign, "of for-" ming Articles of war for the better go-" vernment

* Sect. 55, & 56.

" vernment of his Majeſty's forces, and of " conſtituting Courts-martial, with power " to try, hear, and determine any crimes " or offences by ſuch Articles of war, and " inflict ſuch penalties as the articles di- " rect." But even this extenſive power has its limits; and theſe are of ſuch a nature as to bar every poſſible exertion of a tyrannic authority, or arbitrary infringement of the valuable rights of the ſubject: For while the right of framing *Articles of war*, and inflicting penalties, is declared to belong to the Sovereign, it is at the ſame time provided *, " That no officer or ſol- " dier ſhall, by ſuch Articles of war, be " ſubjected to any puniſhment extending " to *life or limb*, for any crime which is " not expreſſed to be ſo puniſhable by the " Mutiny-act." The penalties, therefore, which it is competent for the Sovereign to decree by his own authority, muſt at the worſt be of a very ſlight and ſubordinate nature,

* Sect. 57.

nature, and calculated merely for the enforcement of good diſcipline; ſince the greater crimes, and their appropriate puniſhments, are defined and regulated by the Mutiny-act, which, as already ſaid, is the operation, not of the Sovereign *per ſe*, but of the united branches of the legiſlature; and the penalty of death cannot be inflicted by any articles of war, "unleſs for ſuch "crimes as are expreſſed to be ſo puniſh-"able by the Mutiny-act."

Beſides this, when it is conſidered that even thoſe ſubordinate penalties, which it is competent for the Sovereign to enact by Articles of war or other regulations for the army, cannot be inflicted but through the medium of a court-martial, which has the eſſential characteriſtics of a jury, and is in fact a trial of the ſubject by his peers; we ſhall immediately be convinced that this power of the Crown, which has furniſhed much ſubject of intemperate declamation to writers tinctured with republican pre-

judices, can never be exerciſed, under our excellent conſtitution, to the injury of the ſubject, or the abridgment of any of the valuable rights of that honourable claſs of men who compoſe the military force of the ſtate.

The only other particular in which the condition of a ſoldier is in any ſhape different from that of other citizens with reſpect to perſonal liberty, is what is indeed eſſential and inherent in the very nature of his profeſſion; he is under authority; he is not his own maſter, or, as the lawyers ſay, *ſui juris*; he can neither diſpoſe of his own time, nor regulate at pleaſure his own actions; and having once embraced the military profeſſion, he cannot, when he chuſes, diveſt himſelf of that character; but muſt, in all matters connected with his vocation, be ſubſervient to the commands of his Sovereign, and under him to the authority of thoſe officers who are his ſuperiors.

But

But to complain of theſe peculiarities of the military profeſſion, either as being ſubſtantial grievances, or as reſtraints which derogate in any ſenſe from the dignity of our nature, is a mark of the moſt extreme folly and perverſion of underſtanding. Either the army muſt ceaſe to exiſt, or it muſt be linked together in all its parts by the moſt abſolute obedience and ſubmiſſion of the ſeveral ranks to their ſuperior officers. For as its function is to act as a regular and perfect machine, of which all the parts, in their mutual dependance on each other, tend to produce one great, uniform, and ſimple effect; it is evident that ſuch effect can never be accompliſhed, unleſs, like the mechanical ſtructure of a time-piece, all thoſe various parts are in due connection, each acted upon by a ſuperior power, and in its turn regulating its inferior, while the whole derives its motion from one great and ultimate moving power. If a ſoldier complains of the reſtraints of

his vocation, he throws no impeachment on his profeſſion, but arraigns himſelf of folly, who did not perceive that thoſe reſtraints are *eſſential* to its condition.

Theſe remarks I mean not to addreſs to our modern advocates for the *natural and impreſcriptible rights of man*, thoſe benevolent apoſtles of liberty, who, in their zeal for the happineſs of the whole human race, overlook and utterly diſregard all the inferior ties of ordinary patriotiſm; the predilection for one particular country above all others, the reſpect for its laws, the duty of obedience to its government, the partial affection for its conſtitution. Of this enlightened ſpecies of philanthropy, it is an eſſential doctrine, that the military condition, which hitherto, in every civilized nation, has been held as honourable, dignified, and manly, is a ſtate of the moſt unjuſt, intolerable, and debaſing ſervitude.

But if, with theſe generous advocates in the cauſe of humanity, I wave all argument,

ment, (and that for the beſt of reaſons, becauſe we hold no common principles of reaſoning on which the argument could be conducted), it is with real concern that I am compelled to notice, and in ſo doing, widely to diſſent from the opinions of authors of a very different claſs indeed from thoſe above alluded to; of authors who, not only on the ſcore of profound abilities, and extenſive knowledge of the laws and conſtitution of their country, but of real philanthropy, are, from the general ſcope and tenor of their writings, entitled to the higheſt regard and veneration of their fellow-citizens. With what pain muſt every wellwiſher to his country, or (what is a ſynonymous term) every friend to its excellent conſtitution, peruſe the following opinions of Sir William Blackſtone, drawn, as I ſhall immediately ſhew, from falſe principles, and penned in an unguarded moment, and at a period of time long antecedent to that fatal exemplification which our

our days have witneſſed, of the pernicious tendency of all ſuch doctrines.

"Martial law," ſays that author*, "which "is built upon no ſettled principles, but is "entirely arbitrary in its deciſions, is, as "Sir Matthew Hale obſerves†, in truth "and reality no law, but ſomething in-"dulged rather than allowed as law. The "neceſſity of order and diſcipline in an "army, is the only thing which can give "it countenance: and therefore it ought "not to be permitted in time of peace, "when the King's Courts are open for all "perſons to receive juſtice according to "the laws of the land."

He who wiſhes to form rational and ſound opinions either in philoſophy, in politics, or indeed in any ſcience, muſt emancipate himſelf from all ſlaviſh ſubjection to the authority of great names. Sir Matthew Hale and Sir William Blackſtone, men profoundly verſed in the *Civil laws* of their

* Blackſt. Com. b. i. c. 13. † Hiſt. C. L. c. 2.

their country, which they have moſt ably explained and illuſtrated, have but incidentally touched on the ſubject of *Martial Law*, whoſe doctrines they had no call to propound, and whoſe principles therefore they were at no pains to inveſtigate. Had thoſe great maſters of civil juriſprudence beſtowed the ſame attention on this ſubject that they have exerciſed on thoſe which fell immediately within their own department, we ſhould have met with no ſuch raſh and ill-founded poſitions as thoſe which I have above quoted.

In fact, the whole of the foregoing paragraph of Sir William Blackſtone teems with error, with inconſiſtency, and with miſrepreſentation. The principles of Military law are as certain, determinate, and immutable, as the principles are of the common and ſtatutory law, which regulate the civil claſſes of ſociety. The author himſelf, in the very next ſentence, aſſigns the great principle on which all

Military

Military law is built, and which is coeval with, and eſſential to the exiſtence of civil ſociety; the neceſſity of order and diſcipline in an army. The Martial Law is a code or body of regulations for the proper maintenance of that order and diſcipline, of which the fundamental principles are, a due obedience of the ſeveral ranks to their proper officers, a ſubordination of each rank to their ſuperiors, and the ſubjection of the whole to certain rules of diſcipline, eſſential to their acting with the union and energy of an organized body.

The Mutiny-act and Articles of War which contain theſe rules of diſcipline, are framed, as we have already obſerved, by the joint will and co-operation of the two houſes of parliament and of the Sovereign, the legiſlative and executive powers of the ſtate; and the obſervance of theſe rules is enforced, either by plain, ſpecific, and fixed penalties appropriated to each offence, where ſuch offence is of a poſitive nature, admitting

admitting of no gradations, or are left, in certain caſes where the offence admits of degrees of criminality, to the deciſion of a jury, in other words, of a court martial. With what juſtice or propriety the military law can therefore be ſaid, in the words of Judge Blackſtone, to be "entirely arbitrary in its deciſions," every impartial mind will determine.

But this law, according to the ſame author, which, being built on no ſettled principles, receives its countenance from the neceſſity of maintaining order and diſcipline in an army, "ought therefore not to "be permitted in time of peace:" a moſt extraordinary concluſion indeed, and of which it is not a little difficult to perceive the connection with its premiſes. To juſtify this concluſion, the author ought previouſly to have ſhewn, that the exiſtence of an army in time of peace was a thing in itſelf unneceſſary and illegal; for while an army exiſts, it muſt be kept under order and diſcipline. But the neceſſity of

ſome permanent military force at all times, for ſecurity's ſake, is ſelf-evident; and the *Bill of Rights* itſelf declares a ſtanding army in time of peace, if with the conſent of parliament, to be legal and conſtitutional. Unleſs, therefore, the author could have ſhewn, that the ſame army which in time of war requires the enforcement of a code of laws, and appropriate penalties for the breach of them, is in time of peace to ſubſiſt by ſome magical bond and connection of its parts, and is to be perfectly trained and regulated without any ſettled rules of diſcipline; we muſt, however unwillingly, pronounce, that the poſition contained in the above ſentence is in the laſt degree incongruous and abſurd.

Nor is the laſt clauſe of the ſentence above quoted one whit more conſonant to reaſon or juſt argument. Military or martial law ought not to be permitted in time of peace, becauſe "the King's courts "are open for all perſons to receive juſtice "according

" according to the laws of the land." Can the laws of the land, that is the common and ſtatute law, adminiſtered in the King's ordinary courts, apply to, or take cognizance of breaches of military diſcipline? Are the civil courts competent to the trial of deſertion, mutiny, diſobedience of orders, inſolence to ſuperior officers, breach of arreſt, falſe muſters, &c.? Are theſe tribunals veſted with the power of puniſhing cowardice? Or does the common and ſtatutory law reach the nameleſs and undefinable offences ariſing from that turpitude of conduct in the ordinary occurrences of life, which the military code moſt emphatically deſcribes as " unbecoming the " character of an officer or a gentleman?" Yet without ſome power which is adequate to the reſtraint and correction of all thoſe deviations from the duty of a ſoldier, the army could not exiſt for a ſingle day*.

* It is indeed true, that, in compliance with the jealous ſpirit of Britiſh ſubjects, with regard to every thing that touches

In a ſimilar ſpirit of falſe reaſoning, the ſame reſpectable author expreſſes his regret, that the ſoldiery "ſhould be re-"duced to a ſtate of ſervitude in the midſt "of a nation of freemen; for Sir Edward "Coke informs us, that it is one of the ge-"nuine

touches civil liberty, the preamble of the Mutiny-act ſeems to give ſome countenance to the idea of a ſuſpenſion of Military Law in time of peace, in the following clauſe. "Whereas no man can be forejudged of life or limb, or "ſubjected *in time of peace* to any kind of puniſhment "within this realm by Martial Law, or in any other man-"ner than by the judgment of his peers, and according to "the known and eſtabliſhed laws of the realm." It is proper however to obſerve, that theſe words, *in time of peace*, are in reality an innovation, which appears to have been firſt introduced into the Mutiny-act, paſſed 1 Ann. 2 ſeſſ. c. 16. without warrant from any preceding ſtatutes in the whole ſeries downwards from *Magna Charta*. The firſt Mutiny-act paſſed in the reign of King William bears no ſuch words; but contains ſimply a proteſt in favour of the ſubjects in general, that they cannot be ſubjected to any puniſhment by Martial Law, or in any other manner than by the common laws of the realm. The introduction of theſe words was ſuperfluous, where Martial Law was utterly diſclaimed as binding the ſubjects in general; and their inſertion tended in fact to weaken the general propoſition, as it might be thence argued, that it was only in time of peace that its general obligation was declared to be ſuſpended; whereas in

" nuine marks of ſervitude, to have the law " which is our rule of action, either con- " cealed or precarious: *Miſera eſt ſervitus,* " *ubi jus eſt vagum aut incognitum.*" But where, it muſt be aſked, is the country here alluded to, where the Military law is either vague and precarious, or unknown? Surely it is not Britain. Can that law be termed

in reality the legiſlature meant to aſſert the broad maxim of the inefficacy of Martial Law at all times to bind the common maſs of the people, who were declared to be no otherwiſe ſubject to puniſhment, than according to the common laws of the realm. But this fundamental maxim or rule being laid down as holding true with reſpect to the ſubject in general, the Mutiny-act proceeds immediately to ordain a poſitive exception in the caſe of military perſons, in the following words. " Yet neverthelefs, it being requiſite for " the retaining all the before mentioned forces in their " duty, that an exact diſcipline be obſerved, and that ſol- " diers who ſhall mutiny, or ſtir up ſedition, or ſhall deſert " his Majeſty's ſervice, be brought to a more exemplary " and ſpeedy puniſhment than the uſual form of the law will " allow; Be it therefore enacted." And then follow the ſeveral enactments and proviſions for that neceſſary purpoſe.—It is plain, therefore, that no argument whatever can be drawn from the ſtyle or tenor of the Mutiny-act, in ſupport of the propoſition, that the Military Law, admitted to be binding in time of war, ſhould ceaſe to have that obligation in time of peace.

termed *vague* or *precarious*, which conſiſts but of a very few ſimple regulations, deliberately enacted by the whole branches of the legiſlature; renewed, it is true, in their binding obligation from year to year, but ſcarcely undergoing even the moſt trivial alteration? Can that law be termed concealed or *unknown*, which receives not only the ordinary promulgation of all other acts of the legiſlature, by its entry in the printed ſtatute-book, but which muſt, by poſitive regulation, be repeatedly inculcated on the memory of every individual of the military profeſſion?—For the Articles of war, the ſubſtance of the military code, muſt be read at the head of every regiment once every two months. How then can it be with juſtice aſſerted, that this law is either concealed or precarious? Such poſitions are equally abſurd as they are miſchievous. It gives me pain to make theſe remarks on a few particular notions of an author, for whoſe opinions, on the general

general doctrines of the law, I have, in common with the world, the higheſt reſpect. But I plead here the cauſe of the Military profeſſion, which is injured and degraded, through actual ignorance of the nature of its eſtabliſhment and laws. To the truth of Sir Edward Coke's general maxim, all men muſt ſubſcribe: the concluſion flows neceſſarily from its premiſes: But if thoſe premiſes are falſe when predicated of the Britiſh government as now exiſting, the concluſion with reſpect to it muſt fall of courſe. That the ſummary mode of execution, which was termed *The Martial law* in former periods of our hiſtory, (when the prerogative of the Crown ſeemed to have no determined limit), deſerved all thoſe characters of tyranny which have been aſſigned to it by Hale and Coke, we may moſt readily acknowlege: But to the Martial law as it exiſts at preſent, under an improved and ſettled conſtitution, and a clearly defined prerogative

tive of the Crown, theſe characters have not the moſt diſtant applicability. It was therefore a palpable overſight (but in a matter of this high conſequence not eaſily excuſable) in our great commentator on the laws of England, to have applied the deſcription of an antiquated and juſtly exploded tyranny, to a well regulated, moderate, and humane ſyſtem, ſuch as the preſent Law-military of this country: a ſyſtem as different from the former, as the conſtitution of England is at this day from the actual government under the Houſe of Tudor. "Martial law, (ſays a high au-
"thority), ſuch as it is deſcribed by Hale,
"and *ſuch alſo as it is marked by Sir Wil-*
"*liam Blackſtone*, does not exiſt in England
"*at all**." The modern Britiſh ſoldier, enjoying

* In Trinity-term 1792, a motion was made in the court of Common pleas, in behalf of Serjeant George Samuel Grant, for a prohibition againſt the execution of the ſentence of a general Court-martial, by which he was condemned to receive a thouſand laſhes, for the crime of having been inſtrumental

enjoying, in common with his fellow-ſubjects, every benefit of the laws of his country,

ſtrumental in the inliſting for the ſervice of the Eaſt-India Company two drummers, knowing them at the ſame time to belong to the Foot-guards. The caſe was argued at great length; and the preſent Lord High Chancellor, then Lord Chief Juſtice of the Common Pleas, in delivering the opinion of the Court, thus pointedly and ſtrongly expreſſed his ſentiments, in reprobation of the falſe ideas reſpecting the Military law, as drawn from ancient writers, or the practices of ancient times, and applied to the preſent; moſt accurately marking the diſtinction between Martial law properly ſo called, and ſo deſcribed by thoſe writers, and that Military law which regulates the Britiſh army. "In the preliminary obſervations on the caſe, the learned counſel (ſaid Lord Loughborough) went at length into the hiſtory of thoſe abuſes that in ancient times had prevailed; and it helped me to an obſervation, that Martial law, ſuch as it is deſcribed by Hale, and ſuch alſo as it is marked by Sir William Blackſtone, *does not exiſt in England at all.* Where Martial law is eſtabliſhed and prevails in any country, it is of a totally different nature from that which by inaccuracy is called Martial law, becauſe the deciſion is by a Court-martial, but which bears no affinity to that which was (when it was attempted to be exerciſed in the kingdom) contrary to the conſtitution, and has been for a century exploded. Where Martial law prevails, the authority under which it is exerciſed claims a juriſdiction over all Military perſons in all circumſtances: even their debts are ſubject to enquiry by a military authority: and every ſpecies of offence committed by any perſon who appertains to the army, is tried, not by the

country, is bound by the military code, ſolely to the obſervance of the peculiar duties of his profeſſion; a code which is ſimple

" civil judicature, but by the judicature of the regi-
" ment or corps to which he belongs. It extends alſo
" to a great variety of caſes not relating to the diſcipline
" of the army, but relative to that ſtate which ſubſiſts
" by Military power; as plots againſt the Sovereign, in-
" telligence to the enemy, which are all conſidered as caſes
" within the cognizance of the Military authority. In the
" reign of King William, there was a conſpiracy againſt
" his perſon in Holland: the perſons guilty of that con-
" ſpiracy were tried by *a council of Officers*. There was
" alſo a conſpiracy againſt his perſon in England; but the
" conſpirators were tried by the *Common law*. Within a
" very recent period the incendiaries attempting to ſet fire
" to the docks at Portſmouth, were tried by the *Common*
" *law*. The delinquencies of ſoldiers are not triable here,
" as in moſt countries in Europe, by *Martial law*: But ge-
" nerally where they are offenders againſt the civil peace,
" they are tried by the Common-law courts. *Therefore*
" it is totally inaccurate to ſtate *Martial law* as having any
" place *whatever* within the realm of Great Britain. But, by
" the providence and wiſdom of Parliament, an army is eſta-
" bliſhed in this country, which it is neceſſary to keep up;
" that eſtabliſhment being fixed by the authority of the legiſ-
" lature. It is an indiſpenſable requiſite of the eſtabliſhment
" of an army, that there ſhould be order and diſcipline kept
" up in that army, and that the perſons who compoſe it
" ſhould, for all offences in their military capacity, be ſubject
" to a trial by their officers. This has induced the abſolute
" neceſſity

ſimple in itſelf, reaſonable in its enact-
ments, eaſy in all its obligations;—level
to the meaneſt underſtanding, and more
effectually

" neceſſity of a Mutiny-act accompanying the army; and it
" has happened at different periods of the government, that
" there has been a ſtrong oppoſition to the eſtabliſhment of
" the army; but the army being eſtabliſhed and voted, that
" led to the eſtabliſhment of a Mutiny-act. It is one object
" of that act, to provide for the army; but there is a much
" greater cauſe for the exiſtence of a Mutiny-act, and that
" is, the preſervation of the peace and ſafety of the king-
" dom: for there is nothing ſo dangerous to the civil eſta-
" bliſhment of a ſtate, as a licentious and undiſciplined army.
" The object of the Mutiny-act, therefore, is to create a
" court inveſted with authority to try thoſe who are a part of
" the army, in all their different deſcriptions; and the ob-
" ject of the trial is limited to breaches of military duty.
" Even that extenſive power granted by the legiſlature to
" his Majeſty to make Articles of war, is limited to the ma-
" king of Articles " for the better government of his forces,"
" and they can extend to no other caſes than ſuch as are
" thought neceſſary for the regularity and due compoſition
" of the army. Breaches of military duty are in many in-
" ſtances ſtrictly defined; in all caſes where a capital puniſh-
" ment is to be inflicted. In other inſtances, where the degree
" of offence may vary exceedingly, it may be neceſſary to
" give diſcretion with regard to the puniſhment; and in
" ſome caſes it is impoſſible more ſtrictly to mark the crime,
" than to call it a neglect of diſcipline."——I have no need
of apology for the length of this quotation, containing an
opinion of ſuch weight, on ſo important a ſubject.

effectually promulgated and better known than any of the ordinary ſtatutory laws of the realm. He complains not himſelf of the hardſhips of his lot; he honours his own vocation, and juſtly accounts it deſerving of the honour and reſpect of others. But with much reaſon he complains of thoſe who ſtudiouſly labour to degrade his condition, by that officious regret, which, while it ſeems to ſpring from a deſire for the melioration of the military ſtate, tends, by its effects on the minds of the weak and ignorant, to diſſolve the fundamental and neceſſary obligations by which alone it can ſubſiſt.

The author of the following Treatiſe truſts, that one reſult of his undertaking, (though he does not propoſe it as his principal end), ſhall be a complete diſproof of all ſuch falſe and injurious opinions regarding the military condition and its laws. But for that important purpoſe, and to clear the way by the removal of all

all prejudices, he ſhall begin by tracing the origin of the Military Law of England, and its progreſs in the different periods of our hiſtory, to that regular ſyſtem which at preſent obtains over the Britiſh dominions.

AN

AN ESSAY ON MILITARY LAW, &c.

CHAP. I.

Riſe and Progreſs of the Military Law in England.

SECTION I.

From the Conqueſt to the Reign of Charles I.

THE Engliſh conſtitution had its progreſs from deſpotiſm to rational liberty, though by irregular and deſultory ſteps; and the Military Law, which was from the

the earlieſt times a part of that conſtitution, as it muſt be of every regular government, exhibited the ſame improvement, with the ſame irregularity in the ſteps of its progreſs.

The Feudal ſyſtem a Military Eſtabliſhment.

The Feudal ſyſtem, in the ſtate in which we find it in England under William the Norman, was entirely a military eſtabliſhment *. He divided the kingdom into ſixty-two thouſand two hundred and fifteen

* It is quite unneceſſary here to enter into the queſtion of late diſputed by our antiquaries, whether the feudal ſyſtem exiſted in England during the Anglo-Saxon period, or was introduced by William. It is on all hands acknowledged, that at leaſt the rigour of the military ſervice was greatly encreaſed by that prince, and by his immediate ſucceſſors, and that the condition of the ſubject became very different with reſpect to civil liberty under the Norman race, from what it had been under their Anglo-Saxon predeceſſors; of which fact this is an irrefragable proof, that in all the complaints made to the Crown, on the ſcore of the feudal ſeverities, previous to the grant of Magna Charta, a conſtant deſire is expreſſed for the reſtoration of the mild laws of Edward the Confeſſor. What theſe particular laws were, we are unfortunately at a loſs to know, as thoſe which bear the name of this prince are generally acknowledged to be of a later date, and at any rate do not correſpond to the idea conceived of them, from the fact above mentioned.

teen military fiefs or portions of land, all holden of the Crown, on the expreſs condition of the vaſſals appearing in arms under his ſtandard, with all their followers, whenever he ſhould require their ſervice. This obligation, in fact, rendered the Monarch of England an abſolute Sovereign, as long as the Barons continued in their allegiance; a ſtate in which the prince had it generally in his power to retain them, by availing himſelf even of their own jealouſies and ambition, and by dexterouſly employing the ſtrength of the many, to curb the dangerous pretenſions of a few. Beſides, in the earlier periods of our hiſtory, the Sovereign was enabled to compel the military attendance and ſervice of his vaſſals, by the moſt cogent of all enforcements, the right which he had of confiſcating or reſuming their fiefs *; a right which, while it bound

* Although the moſt uſual puniſhment of the vaſſal's neglect of ſervice was a pecuniary fine, yet there cannot be

a

the ſubject, however reluctantly, to obedience and ſubmiſſion, greatly increaſed the wealth, and conſequent influence of the prince.

Magna Charta. But in the mean time, the nation itſelf acquired a military ſpirit, which, directed to one object by the ſtrong ſenſe of general oppreſſion from the exorbitant power of the Crown, became the engine for accompliſhing its ſubſequent freedom. The Barons ſuffering under the tyranny of the Norman Princes, and feeling all equally the rigour of the feudal ſervitude, and more particularly the hardſhip of the foreſt-laws, which rendered even the precarious property which they had in their lands of little value, as being for ever ſubject

a doubt, that in England, as well as in all the other feudal kingdoms, the Sovereign had the right, and frequently exerciſed it, of depriving the vaſſal of his land, for an obſtinate contempt of the ſummons to attend the royal ſtandard. Of the exerciſe of this important power we find many inſtances recorded in Maddox, Hiſt. of Exchequer, vol. 1. p. 662.

ſubject to the Crown's encroachments, united at length in ſo general a confederacy, and muſtered in the field a body of ſuch accumulated ſtrength, that the Sovereign was compelled to yield to every term which they required of him, and to ſign that celebrated Charter, which is the foundation of our free conſtitution.

Military Service of the Subjects.

But the *Magna Charta*, however important to the general liberties of the nation, did not aboliſh the great feudal bond, by which the ſubjects were tied down to Military ſervice at the command of the Crown. Every poſſeſſor of a Knight's fief, of which there were, as above remarked, above ſixty thouſand in the kingdom, was bound to furniſh a ſoldier to attend the King in his wars, during forty days in every year. Thus the King had, at his abſolute command, and free from all expence, an army of more than ſixty thouſand men. As the Crown, however, in peaceable times, was more in want of money than of men, it be-

came cuſtomary to take pecuniary commutations in lieu of perſonal ſervice; though in reality the Military part of the feudal ſyſtem was underſtood to be ſtrictly conſtitutional, till it was formally aboliſhed at the Reſtoration.

Aſſize of Arms. The Military eſtabliſhment above mentioned, though of eminent ſervice to the King in his foreign wars, was found inadequate for the regular and permanent defence of the kingdom. An Aſſize of Arms was therefore firſt enacted by Parliament, 27th of Henry II. and afterwards by the ſtatute of Winchester, 13th Edward I. by which every ſubject, according to his rank and meaſure of fortune, was bound to provide a proportional quantity of arms for the maintenance of the King's peace: And by this laſt ſtatute, conſtables were appointed, to ſee the ſtrict execution of the law, and to preſent to the juſtices all ſuch defaults as they ſhould obſerve; to which proviſo was ſubjoined this ſpecial enact-

ment,

ment, declaratory of the Royal prerogative, that "the King ſhall provide remedy "therein*."

To enforce the obligations of theſe ſtatutes, it was cuſtomary for the Sovereign to iſſue, from time to time, *Commiſſions of Array*, directed to ſome of the principal men in each county, requiring them, at ſtated times, to muſter, arm, and exerciſe the inhabitants of the diſtrict; and of theſe commiſſions of array, the form was ſettled by a ſtatute paſſed in the fifth year of Henry IV. The iſſuing of ſuch commiſſions however ceaſed to be cuſtomary about the time of Henry VIII. when in their ſtead the Sovereign thought it more adviſable to appoint Lords Lieutenants of the Counties, as the ſtanding repreſentatives of the Crown, to maintain proper order and diſcipline in the national Militia. Commiſſion of Array.

The

* For a particular account of the aſſize of arms and commiſſion of array, ſee Appendix, N° 1.

Statute of Wincheſter.

The right of the Sovereign to command the whole Military force of the kingdom, had been ſolemnly recogniſed by all the ſtates, in a ſtatute paſſed at Wincheſter in the reign of Edward I. 30th October 1279, which, as it is of high importance in ſhewing the ſenſe of the nation on this material part of the royal prerogative at that early period, it is proper here to engroſs at full length.

" The King, to the juſtices of his bench,
" ſendeth greeting: Whereas of late, be-
" fore certain perſons deputed to treat
" upon ſundry debates had between us
" and certain great men of our realm,
" amongſt other things it was accorded,
" That in our next Parliament, after provi-
" ſion ſhall be made by us, and the com-
" mon aſſent of the Prelates, Earls, and
" Barons, that in all Parliaments, treaties,
" and other aſſemblies, which ſhould be
" made in the realm of England for ever,
" every man ſhould come without all force

" and

" and armour, well and peaceably, to the " honour of us, and the peace of us and " our realm: And now, in our next Par- " liament at Weſtminſter, after the ſaid " treaties, the Prelates, Earls, Barons, and " the commonalty of our realm there aſ- " ſembled to take advice of this buſineſs, " have ſaid, that to us it belongeth, and " our part is, through our Royal ſeigno- " ry, ſtraightly to defend force of ar- " mour, and all other force againſt our " peace, at all times, when it ſhall pleaſe us, " and to puniſh them which ſhall do con- " trary, according to our laws and uſages " of our realm; and hereunto they are " bound to us as their Sovereign Lord at all " ſeaſons when need ſhall be." 13th Ed. I. " St. 2. c. 6."

This command and regulation of the whole Military force of the ſtate was held to be ſo indiſputably the prerogative of the Crown, and every perſon fit to carry arms was underſtood to be ſo ſtrictly bound

1 Edw. III. St. 2. c. 15.

bound by the natural allegiance of a ſubject, to obey the King's ſummons, and appear in arms whenever called upon to attend the royal ſtandard, that by a ſubſequent ſtatute, 1ſt Edward III. St. 2. c. 15. it is declared, "that no man ſhall bind "himſelf by any written obligation to "come armed to the King, for that every "ſubject is at his commandment;" for a particular and poſitive obligation was juſtly held to be unneceſſary and improper, where there exiſted antecedently a natural and general duty of the ſubject, which all men alike were bound to obey.

Court of Chivalry, or Conſtable's Court.

It does not however appear that the Sovereigns of England, in virtue of their conſtitutional prerogative of commanding the whole military force of the kingdom, exerciſed a power entirely diſcretionary over the army, or a juriſdiction altogether arbitrary in the trial and puniſhment of the individuals who compoſed it. The ſtatute above recited of Edward I. acknowledges

ledges the King's power to puniſh only "according to the laws and uſages of the "realm:" And it is certain that the Kings of England never perſonally interfered in inflicting puniſhments for military offences, any more than for thoſe crimes and delinquencies which were cognizable by the civil courts. For the trial of military crimes, the King's Court of Chivalry, or the court of the High Conſtable and Marſhal of England, had, till the later periods of our annals, an appropriate and excluſive juriſdiction *: and though it muſt at the ſame time be owned, that the rules or laws by which this court proceeded ſeem to have flowed entirely from the Crown, or at leaſt to have been framed by the Sovereign, with the advice of the conſtable and marſhal, and a few other officers of ſtate, without undergoing the ſanction of Parliament; yet theſe Military Laws being

* See in Appendix N° II. an account of the powers of the Conſtable and Marſhal, and of the Court of Chivalry.

promulgated to the army*, afforded a certain and positive rule of conduct, and while they imposed a check on the arbitrary procedure of the court of arms or chivalry, furnished a security to the subject against partial oppression or injustice.

Limitation of its Jurisdiction by 13. Rich. II. c. 2.

But this court of the constable and marshal had, as it appears, very early begun to stretch its jurisdiction beyond its just limits, and to trench upon the department of the civil judicatures of the kingdom. This was not unnatural in those times, when the feudal tenures made all men consider themselves as born to military service, and of course at least occasionally subject to military law. Accustomed to the jurisdiction of the court of chivalry in all matters relative to war, which formed a great part of the business of life, it was not easy to draw

* Of these ancient codes of Military law, some are yet extant; in particular, one compiled by Richard II. *anno* 1386, at the time when an immense army of 200,000 men was embodied for the defence of the kingdom against a meditated invasion from France.

draw a diſtinct line of ſeparation between theſe and the purely civil tranſactions, of which the cognizance belonged to the ordinary courts of juſtice. Accordingly, as courts are ſeldom diſpoſed to limit their own juriſdiction, the court of the conſtable and marſhal ſeems to have arrogated a cumulative judicature with thoſe of the Common law, ſince it became neceſſary for the legiſlature to paſs a reſtrictory act, 13th Rich. II. c. 2. to correct that abuſe.

This act, after ſtating that the encroachments made by the court of the conſtable and marſhal on the ordinary courts of law were matter of ſerious complaint, defines the limits of the powers of the conſtable in theſe wotds: "To the conſtable "it pertaineth to have cognizance of con- "tracts touching deeds of armes, and of "war out of the realm, and alſo of things "which touch armes or war within the "realm, which cannot be determined nor "diſcuſſed by the common law; with

" other uſages and cuſtoms to the ſame " matters pertaining, which other conſta- " bles heretofore have duly and reaſonably " uſed in their time." This ſtatute, however, ſtill left to the Military court a juriſdiction ſo ample and comprehenſive, that it was not to be expected it could long continue to be tolerated in that extent, by a nation ever jealous of the military power of the Crown, and reluctantly ſubſcribing to any diſtinction between the character of ſoldier and of citizen.

Decline of the Authority of the Court of Chivalry, Stat. 18. Hen. VI. c. 19.

Of this high military juriſdiction, the firſt abridgment was made in the diſtracted reign of Henry VI. when the feeble authority of the Sovereign being equally inſufficient for the exertion of his conſtitutional powers and for reſiſtance of any infringement of them, the parliament made a bold attack on the power of the court of chivalry, by paſſing an act for the puniſhment of deſertion, and transferring the cognizance of that crime to the civil magiſtrate.

magiſtrate. This ſtatute, 18th Hen. VI. c. 19. proceeding on the ground, that "ſoldiers, after receiving part or the "whole of their wages from their cap-"tains or maſters, for the term of ſervice "for which their maſters have indented *, "have deſerted and gone where they "would, long before that term was expi-"red, whence great damage has ariſen "to the King and to the realm," enacts, "That every man ſo offending, unleſs "compelled by ſickneſs, in which caſe he "ſhall repay his wages, in order to fur-"niſh another in his place, ſhall be pu-"niſhed as a felon;" and power is given to the juſtices of peace to inquire and determine in the trial of the crime.

From this period we may date the decline of the authority of the conſtable and marſhal's

Ratified by 7 Hen. VII.

* It was cuſtomary at this period for perſons to offer their ſervices to the Crown as officers, and to contract by indenture to furniſh a certain number of ſoldiers, for a certain ſum, during a ſtipulated term of ſervice.

marſhal's court, and conſequently of the high military powers of the Crown. The Sovereign, henceforward, became accuſtomed to take the aid of parliament in enacting laws for the regulation of the army; for even after the termination of the civil wars, and the complete ſettlement of the Crown by the acceſſion of Henry VII. when the royal prerogative was at its height, we find a ratification of the act 18th Hen. VI. in the 7th year of Henry VII. and the crime of deſertion declared by parliament to be felony without benefit of clergy. By the ſame ſtatute it is enacted, that if any captain be retained to ſerve the King in his wars, either on ſea or beyond the ſea, and have not his perfect number of men and ſoldiers for which he contracted with the King, or ſhall not give them their full wages which he has received from the King, except the ſums which he is allowed to retain for cloathing, (viz. 6 s. 8 d. for the year's cloathing

cloathing of a yeoman, and 13 s. 4 d. for that of a gentleman), he ſhall for ſuch default forfeit to the King all his goods and chattels, and his body to priſon. The ſame act ordains every captain to pay his ſoldiers their wages within ſix days of his receiving them from the King, under the ſame penalty.

This laſt ſtatute and the preceding were ratified by 3d Hen. VIII. c. 5. which further ordains, that no captain ſhall be charged upon this ſtatute for lack of his proper number of ſoldiers, provided he certify to the King's Lieutenant within ten days, the departure or lack of ſuch ſoldiers if on land, or to the admiral of the navy if at ſea.

And by 3d Hen. VIII. c. 5.

A more comprehenſive ſtatute for the regulation of the army than any hitherto paſſed, and which in many of its enactments bears a near reſemblance to our preſent Mutiny-act, is Stat. 2d & 3d Edw. VI. c. 2. This ſtatute, proceeding on the narrative,

Stat. 2d & 3d Edw. VI. c. 2.

rative, that many of the King's loyal ſubjects have, according to their bounden duty, and at a great expence, appointed and ſent forth many ſoldiers to ſerve the King in his wars in Scotland and elſewhere, and that of theſe ſoldiers many have ſold, loſt, or fraudulently exchanged their horſes and armour, gives power to the lieutenant, high-admiral, vice-admiral, warden, &c. or any of their deputies, to impriſon the ſaid offenders, until they make complete ſatisfaction: It empowers the juſtices of the peace to apprehend and commit them wherever they ſhall be found: It declares that thoſe ſoldiers who ſhall deſert from their officers without leave of the lieutenant, ſhall be held guilty of felony without benefit of clergy: It impoſes high penalties on all captains or other officers who ſhall take any reward from their ſoldiers for granting them diſcharges, without leave of the King's Lieutenants; and on ſuch officers as ſhall detain

tain the pay or wages of the ſoldiers: it gives to the juſtices of peace the power of enquiring and determining in all caſes of deſertion: and finally, it ordains the contents of this act to be proclaimed by every field-officer, in every field under his charge, once every month; and by every governor or captain of a garriſon or fortreſs, once every quarter of a year, within his charge.

In the ſtatutes above detailed, the cognizance of the ſeveral offences therein deſcribed is declared to lie with the juſtices of the peace; and the form of trial is, by a ſubſequent act, 4th and 5th Phil. and Mar. c. 3. appointed to be by *Jury*, unleſs the offence be committed during the time of actual ſervice, in which caſe the Lord Lieutenant, or Lord Warden, or any other Chieftain, during the time of their commiſſion, ſhall have power to determine in ſuch offences according to their diſcretion. Stat. 4. & 5. Phil. & Mar. c. 3.

Theſe ſtatutes ſufficiently indicate, that the ancient judicature of the conſtable's court, though never expreſsly aboliſhed, had gone into entire diſuſe, and that the military authority of the Crown, though ſtill acknowledged in its miniſterial part, the ſupreme command of the army, was, as to its judicial part, exerciſed through the medium of parliament, and even by the intervention of the civil magiſtrate. But with reſpect to this latter particular, there was ſtill room for amendment. The trial of Military crimes before the ordinary juſtices of the peace, and by a jury of ordinary citizens, was contrary even to the general analogy of the Engliſh laws, and was evidently an incongruous and irregular procedure. If it was proper that the Military laws ſhould be framed by parliament, of which generally a conſiderable proportion is of that claſs of men; it was no leſs proper that they ſhould be adminiſtered by military men, in the trial of all

all offences regarding their own condition. But before arriving at this ultimate improvement, we muſt continue to trace, in a chronological order of detail, the various changes in the law-martial of England, which was by no means uniformly progreſſive to melioration, or to a regular and well digeſted ſyſtem.

An Extenſion of the Martial Law neceſſary in times of danger.

It had ever been deemed conſtitutional, for the Sovereign, in times of extraordinary diſorder and turbulence, to uſe the military power of the Crown, for the ſpeedy repreſſion of ſuch enormities, and the reſtoring of the public peace. It muſt be allowed that there are ſeaſons when the ordinary courſe of juſtice is, from its ſlow and regulated pace, utterly inadequate to the coercion of the moſt dangerous crimes againſt the ſtate; when every moment is critical; and without ſome extraordinary remedy, the commonwealth would periſh. The extenſion of a power beyond the law, is therefore in ſuch times of dan-

ger juſtified, on the principle of abſolute neceſſity; and there is every reaſon to treat with extreme diſtruſt the motives of thoſe pretended patriots, who, arraigning thoſe neceſſary meaſures on the ground of a violation of the rights of the ſubject, would oppoſe their exerciſe, be the hazard ever ſo great that calls them forth.

Inſtances of its Uſe and Abuſe.

But this power, juſtified only by neceſſity, is to be uſed with the utmoſt circumſpection. The Engliſh annals afford examples alike of its wiſe and ſalutary exerciſe, and of its flagrant abuſe.

How exerciſed under Rich. II.

In the time of Richard II. when, during the actual movements of that formidable inſurrection which had for its object the ſeizing of the King's perſon, and ſubverting the whole frame of government, its leader Wat Tyler, though not actually raiſing his hand againſt the royal perſon, was killed by the Lord Mayor, and ſome of the moſt daring of his partizans were put to death at the feet of the King;

King; this high exerciſe of the military power was never queſtioned, on the ſcore of exceeding that juſt and neceſſary extenſion which the emergency required. But when, after the actual ceſſation of this rebellion, its ringleaders were ſeized, and many of them put to death without any form of trial, by the ſole authority of the King's lieutenants; though no man doubted of the juſtice of their fate, the mode of their puniſhment excited general diſſatisfaction; and it was found neceſſary for the King to uſe the authority of Parliament, for granting a general pardon to all thoſe who, from no motives of malice, but ſolely from regard to the injured dignity of the Sovereign, and high ſenſe of the outrage to the ſtate, had exceeded the juſt bounds of law in the puniſhment of thoſe rebels *. This example affords a criterion for aſcertaining the limits within which it ſeems indiſputable that this extraordinary

* 5 Rich. II. St. 1. c. 6.

traordinary power of the ſword may be exerciſed in the hands of the Sovereign.

In the reign of Queen Mary.

When Mary, in her ardent zeal for the extirpation of hereſy, iſſued, in 1558, a proclamation *, "That whoſoever had in "his poſſeſſion any heretical, treaſonable, "or ſeditious books, and did not preſently "burn them, without reading them, or "ſhewing them to any other perſon, "ſhould be eſteemed a rebel, and without "any farther delay be executed by the "Martial law;" it may be doubted whether, even in her own time, the moſt bigotted ſupporter of arbitrary power would have pretended to juſtify, on any pretext of authority or conſtitutional principle, this extraordinary ſtretch of the prerogative.

In the reign of Q. Eliſabeth.

But even in the boaſted times of Eliſabeth, the ſplendour of the public acts of her reign, and the vigour and ſpirit with which her domeſtic adminiſtration was conducted, ſeemed to have blinded the nation

* Burnet's Hiſtory of the Reformation, vol 2. p. 363.

tion to the moſt daring violations of the rights of the ſubject. The exerciſe of Martial law on all claſſes of the people, was no more queſtioned as inherent in the royal prerogative, than the power of diſpenſing with the execution of the public ſtatutes of the realm, the power of impriſonment at pleaſure, the right of exacting loans and benevolences from the ſubject, and of erecting monopolies. It was not neceſſity that was cited to juſtify any infringement or ſuſpenſion of law; the motive of convenience was equally ſufficient for the prince; and the reaſon ſeemed equally plauſible in the eyes of the people. A riotous mob having, in June 1595, committed great diſorders in London and in the neighbourhood, and inſulted the Lord Mayor in his attempts to quell them, Queen Eliſabeth, though in the time of profound peace, iſſued her proclamation, appointing Sir Thomas Wilford her Proveſt-marſhal, with power to apprehend

" all

" all inſolent and deſperate offenders, and " ſpeedily ſuppreſs them by execution to " death, according to the juſtice of Mar- " tial Law*;" and this formidable edict was carried into effect without the ſmalleſt murmur on the part of the people.

In the reign of James I.

In the ſucceeding reign of James I. although a few ſpeculative men began to ſcrutinize with ſome ſtrictneſs the foundation of thoſe ſtate-maxims which the Prince, with much imprudence, was daily forcing upon the public mind; yet the high prerogative of the Crown appears to have loſt nothing of the reality of its powers, and the Engliſh government ſeems, even in theory, to have been admitted to border upon an abſolute monarchy. To this effect the following paſſage from the State Maxims of Sir Walter Raleigh is very remarkable. " Monarchies are of two ſorts, " touching their power or authority, viz. " 1. Entire, where the whole power of or- " dering

* Rymer's Fœd. tom. 16. p. 279.

" dering all ſtate-matters, both in peace
" and war, doth by law and cuſtom ap-
" pertain to the Prince, *as in the Engliſh*
" *kingdom*, where the Prince hath the power
" to make laws, league and war; to create
" magiſtrates; to pardon life; of appeal,
" &c. Though to give a contentment to
" the other degrees, they have a ſuffrage
" in making laws, yet ever ſubject to
" the Prince's pleaſure and negative will.
" 2. Limited or reſtrained, that hath no
" full power in all the points and matters
" of ſtate, as the military King, that hath
" not the ſovereignty in time of peace, as
" the making of laws, &c. but in war
" only, as the Polonian King."

Statutes of Armour abrogated.

In this reign were abrogated many of the ancient ſtatutes which were conceived to be unſuitable to the ſpirit of the times. In particular, the ſtatutes of armour, viz. 27th Hen. II. 13th Edw. I. & 4th & 5th Phil. & Mary, c. 2. by which all ſubjects, according to their fortune, were bound

to furniſh a certain quantity of arms, horſe, harneſs, &c. were repealed by parliament, 2d Jac. I. c. 25. & 21ſt Jac. I. c. 28. The abrogation of theſe ancient laws was, of itſelf, a ſymptom of a conſiderable revolution of opinions with reſpect to the liberties of the ſubject. Commercial opulence, diffuſing itſelf in a variety of channels, had foſtered a ſpirit of independence in the great maſs of the nation; and ambition, ever inſeparable from riches, began to furniſh views of the reciprocal rights of the Sovereign and people, very different from thoſe which had till now prevailed in England.

SEC-

SECTION II.

From the Reign of Charles I. to the Revolution.

CHARLES I. ſucceeded to all the authority and prerogatives of his predeceſſors. Inheriting from nature an elevation of mind, which would have prompted to act with dignity in any ſtation of life, and educated to a high ſenſe of the amplitude of thoſe powers which had, for the period of near two centuries, been eſteemed the legitimate rights of the Sovereign,—acting, as he judged, on a principle of duty, as deeming it nothing leſs than treaſon in a Prince to impair himſelf, or allow to paſs diminiſhed to his ſucceſſors, that authority which he regarded as a ſacred truſt committed to his hands; he was induced, moſt naturally, but fatally Charles I.

for himſelf as well as for the conſtitution, to adhere to thoſe precedents which the practice of ſome of the moſt popular of his predeceſſors had warranted, and for which the auſtere and uncomplying temper of his Parliaments furniſhed a much ſtronger apology than could ever in former times have been urged for the Crown. But the period was now arrived, when all encroachment on the part of the Sovereign, however ſanctified by practice, was to be rigidly repreſſed, all excreſcence of authority cut down to the roots. Happy for the nation, had that laudable object been the limit of attack upon the regal powers: but a rigorous reformation once begun, the zeal of its abettors, rouzed into fury by the moſt culpable ambition, ſoon forgot every boundary of conſtitutional principle. Prevailing in every requeſt which they made for the redreſs of real abuſes, increaſing in their demands with every new compliance,

ance, and ſpurning at length at all conceſſion on the part of their humiliated and injured Sovereign, ſhort of an abſolute annihilation of the kingly office; the laſt appeal was made to the ſword, and the conteſt decided by the entire deſtruction of the conſtitution.

In this fatal progreſs, it is eaſy to mark the ſteps of innovation on the high military powers of the Crown, and to draw a diſtinct line of difference between ſuch as were juſt, neceſſary, and agreeable to conſtitutional principles, and thoſe which are indefenſible on any baſis of juſtice, of expedience, or of legality.

Charles, pledged to a war for the ſupport of his brother-in-law, the Elector Palatine, (a meaſure to which the voice of the nation, and even Parliament itſelf, had, in the preceding reign, moſt ſtrongly prompted), found his laudable ardour harſhly repreſſed by his firſt Parliament, in voting a ſupply utterly inadequate to its

its purpoſe. Feeling his honour engaged to his foreign allies, the King was driven to the expedient, often employed by his predeceſſors, of iſſuing writs for borrowing money of the ſubject. But what conſtituted both the grievance and the illegality attending this meaſure, was the billeting of ſoldiers on ſuch as refuſed to lend. This was an exertion of the military power of the Crown, which, however it might be countenanced by former practice, was clearly unconſtitutional, as repugnant to thoſe ancient charters which eſtabliſhed the general liberty of the ſubject. The army, ill-paid and undiſciplined, and thus employed as a ſcourge on the people, committed numberleſs outrages, which the King had no other means of repreſſing than by a moſt rigorous exerciſe of Martial law. Commiſſions were given * to the Lords Lieutenants and their deputies, to proceed againſt all ſoldiers, mariners, and

* Rymer's Fœd. tom. 18. p. 751.

and other diſorderly perſons joining with them, who ſhould be guilty of felonies, robberies, murders, or other miſdemeanours, according to certain inſtructions given by his Majeſty, and to execute all ſuch perſons immediately as in time of war; a remedy which the ſtrict adherents to conſtitutional principles deemed worſe than that diſeaſe which called it forth.

Petition of Right.

It was with reaſon, then, that the Petition of Right, 3d Car. I. was levelled at theſe and other manifeſt abuſes of the prerogative of the Crown. The 6th ſection of that important ſtatute declares, that,

" Whereas of late, great companies of " ſoldiers and mariners have been diſ- " perſed into divers counties of the realm, " and the inhabitants, againſt their wills, " have been compelled to receive them " into their houſes, and there to ſuffer " them to ſojourn, againſt the laws and cuſ- " toms of this realm, and to the great " grievance and vexation of the people.

" 7. And

" 7. And whereas, by authority of Par-
" liament, in the 25th year of Edward III.
" it is enacted, that no man ſhould be fore-
" judged of life or limb againſt the form
" of the Great Charter, and laws of the
" land; and by the ſaid Great Charter,
" and other laws of this realm, no man
" ought to be adjudged to death but by
" the laws eſtabliſhed in this realm;—Ne-
" verthelefs, divers commiſſions under the
" great ſeal have iſſued forth, by which
" certain perſons have been appointed
" commiſſioners, with power and autho-
" rity to proceed within the land, accord-
" ing to the juſtice of Martial law, againſt
" ſuch ſoldiers or mariners, or other diſ-
" ſolute perſons joining with them, as
" ſhould commit any murder, robbery, fe-
" lony, mutiny, &c. and by ſuch ſummary
" courſe and order as is agreeable to Mar-
" tial law, and as is uſed in armies in
" time of war, to proceed to the trial and
" condemnation of ſuch offenders, and

" them

" them to cauſe to be executed and put to " death according to the Law-Martial.

" 8. By pretext whereof, ſome of " your Majeſty's ſubjects have been by " ſome of the ſaid commiſſioners put to " death, when and where, if by the laws " and ſtatutes of the land they had de- " ſerved death, by the ſame laws and " ſtatutes alſo they might, and by no " other ought to have been judged and " executed.

" 9. And alſo ſundry grievous offen- " ders, by colour thereof claiming an ex- " emption, have eſcaped the puniſhments " due to them by the laws and ſtatutes of " this realm, by reaſon that divers officers " and miniſters of juſtice have unjuſtly " refuſed or forborne to proceed againſt " ſuch offenders according to the ſame " laws and ſtatutes, upon pretence that " the ſaid offenders were puniſhable only " by Martial law, and by authority of " ſuch commiſſions as aforeſaid; which

" commiſſons are wholly and directly con-
" trary to the laws and ſtatutes of this
" realm.

" 10. They do therefore humbly pray,
" That your Majeſty would be pleaſed to
" remove the ſaid ſoldiers and mariners,
" and that your people may not be bur-
" dened in time to come; and that the
" aforeſaid commiſſions for proceeding by
" Martial law may be revoked and annul-
" led; and that hereafter no commiſſion
" of the like nature may iſſue forth to
" any perſon whatſoever to be executed as
" aforeſaid; leſt by colour of them, any
" of your Majeſty's ſubjects be deſtroyed
" or put to death, contrary to the laws
" and franchiſe of the land."

To this great retrenchment of the high military power of the Crown, which, though reaſonable and neceſſary, in as far as it went to the correction of all abuſive exertion of the prerogative, muſt be deemed exceſſive, inaſmuch as it aboliſhed altogether

altogether the exerciſe of the Martial law, even in caſes of the moſt extreme and urgent danger, the King, with much reluctance, was obliged to conſent. And here certainly it might have been expected that the ſpirit of reform would have found its limit. Other conceſſions of ſtill greater importance to the general liberty of the ſubject, were made by the ſame ſtatute,—as the abolition of all taxes, aids, and loans, without conſent of parliament; the renouncing of the power of arbitrary impriſonment, outlawry, and exile; and the inflicting of any corporal puniſhment, unleſs by due proceſs of law;—ſo that the change produced in the government by this ſingle ſtatute, is juſtly conſidered by all moderate men as almoſt equivalent to a revolution, and a new contract between the King and people. But conceſſion only paved the way for freſh demands of reſtriction; and the ſpirit of uſurpation was ſoon more completely manifeſt on the part

of the commons, than it had ever been, even in the worſt times, on that of the Crown.

Its conſequences with regard to the Military State.

In the interval between the King's fourth and fifth parliament, the Scots having invaded England, an army of 21,000 men was raiſed by Charles for the neceſſary defence of the kingdom. From the want of all ſupplies by parliamentary authority, the King was obliged to raiſe ſubſidies from the clergy, and to borrow money from his miniſters and courtiers. *Coat-and-conduct* money was likewiſe levied from the counties; an ancient practice, but of which it was generally thought the illegality was ſufficiently declared, or at leaſt neceſſarily implied in the Petition of Right. The army, tainted with puritanical prejudices, bore no good will to an expedition againſt the Scottiſh covenanters, and mutinies had ariſen in many of the counties, in which ſeveral of the officers had been murdered by their men. To repreſs

theſe

theſe enormities, a ſtrong exertion of authority, and the ſtricteſt rigour of diſcipline, were abſolutely neceſſary. But how were theſe to be reconciled with the Petition of Right, which, in its ardour of reform, had ſwept away the Martial law altogether? The generals found their authority utterly inſufficient for the maintenance of order; and recourſe was had to the opinion of eminent lawyers for advice how to act in this critical emergency. It was now ſeen and confeſſed that the commons had deprived the Sovereign of a power abſolutely eſſential for the preſervation of the State. In want of a ſure principle on which to found their opinion, the lawyers propoſed an intermediate courſe, which is founded on no principle whatever. They declared that Martial law could only be exerciſed when the army was actually in ſight of an enemy; and the generals having executed one of the moſt daring of the mutineers, they

they adviſed an application to the Crown for pardon for this illegal ſtretch of authority *; a meaſure which, if actually recurred to, it was neceſſary to conceal from the army, otherwiſe all military ſubordination muſt have been at an end.

The Parliament aſſumes the Military Power.

In 1642, after the long parliament had voted its own perpetuity, and obtained the King's conſent to that deciſive meaſure, which unhinged the whole frame of the conſtitution, the commons, ſenſible that the ſword alone could give ſecurity to their uſurped power, were determined, by one bold ſtretch of authority, to provide for themſelves this important ſafeguard, and at the ſame time entirely to diſarm the Crown. A raſh (though at the time

* This opinion was ſo repugnant to the ſentiments of the officers of the army, that Lord Conway boldly declared, that if the King would give him a commiſſion to execute Martial law, he would ſtand to the conſequence; and if any lawyer ſhould deny his authority, he would hang him up, as the ſhorteſt way of refuting his argument. Ruſhworth, vol. 3. p. 1199.

time perhaps a neceſſary) conceſſion of the King, had afforded a pretext ſuitable to their wiſhes. The rebellion raging in Ireland, Charles, at that time in Scotland, felt, from the late reſtrictions on the military prerogative, his utter inability to ſuppreſs that dreadful inſurrection. He committed to the parliament the charge and proſecution of the war in Ireland; a commiſſion of which they immediately availed themſelves, as of a transference into their hands of the whole military power of the Crown.

A bill was now prepared "for the "better raiſing and levying of ſoldiers "for the preſent defence of the king-"doms of England and Ireland," in the *preamble* of which it was expreſsly declared, that the King's power of preſſing ſoldiers, which had been acknowledged in all former times as belonging to the Crown, was illegal, unleſs in the caſe of ſudden invaſion; yet this power being neceſſary to be exerciſed at this time for the

the ſuppreſſion of the rebellion in Ireland, and the prevention of conſpiracies in England, authority was given to the juſtices, &c. to impreſs ſuch a number of men as his Majeſty and the two Houſes of Parliament ſhould appoint. The King ſignified his readineſs to paſs the bill, provided the preamble was omitted; but this deſire being intimated while the bill was only in dependence, was declared by the commons to be a high breach of privilege. The King apologized for his error, and the bill *with its preamble* paſſed the two Houſes, and received the royal aſſent *.

Proceeding in their exerciſe of the military power, the parliament now took the command of all the garriſons and fortified places. The town of Hull, which contained a vaſt ſtore of arms, the Tower of London, the principal magazine of the kingdom, Portſmouth, and the command of the fleet, were

* Ruſhworth, vol. 5. p. 554.; Parl. hiſt. vol. 10. p. 110.

were all committed to officers appointed by parliament, and ſtrictly enjoined to act only by their orders. Lieutenants and deputies for the counties were nominated by the commons, and declared accountable to them alone for their conduct, and a bill prepared for transferring at once the command and ordinance of the militia into the hands of their commiſſioners. To this laſt uſurpation, deciſive of a deſign of utterly overthrowing the conſtitution, Charles gave a firm and pointed refuſal of his aſſent; which was anſwered by a vote of the commons, declaring the King's adviſers to be enemies to the ſtate, and approving of the meaſures of all ſuch of the ſubjects as ſhould put themſelves in a poſture of defence againſt the common danger *. This vote, when conſidered with its preparatory and accompanying circumſtances, was equivalent to a declaration of war. The oſtenſible au-

* Ruſhworth, part 3. vol. 1. b. 4. p. 524.

thority of the King was, however, ſtill conſidered as eſſential to all exerciſe of the military power; and the commons iſſued their orders in the name of their Sovereign *, for aſſembling and muſtering the militia, and for the levying of troops to be employed in actual war againſt his perſon, and for the utter ſuppreſſion of his power and functions.

It was now neceſſary to oppoſe force to force. The ordinance for the muſtering of the militia, was a meaſure of the commons alone; for though iſſued in the name of Lords and Commons, a majority of the former in a full houſe had rejected it as utterly unconſtitutional †. The King therefore, by proclamation, prohibited all perſons whatever from yielding obedience to this illegal order, and iſſued at the ſame

* A ſophiſtical diſtinction was now invented between the office and the perſon of the King. The parliament in their edicts bound all perſons to obey the orders of his Majeſty, *ſignified by both Houſes of Parliament.*

† Ruſhworth, vol. 5. p. 657.

ſame time his commiſſions of array to certain of the nobility, for ſummoning out and muſtering the militia in ſeveral of the counties. In the former of theſe meaſures, the King ſtood clearly juſtified upon the ſoundeſt principles of the conſtitution; but in the latter, the point of legality was more queſtionable; for although ſuch commiſſions appear warranted by immemorial practice of the Crown in former reigns, the Petition of Right having eſtabliſhed the people's immunity from all taxes, aids, or other charges, than ſuch as were impoſed by conſent of parliament, this command from the King alone to draw forth the militia, and arm them at the expence of the counties, might plauſibly be conſtrued into a violation of that ſtatute. The fair concluſion to be drawn is, that both parties were now purſuing meaſures which it is impoſſible to juſtify upon any ground of ſtrict legality; but there was this difference in favour of the

Sovereign, that his was a defenſive ſtruggle, for the maintenance of the juſt, the neceſſary, and hitherto acknowledged prerogative of the Crown, which his opponents had violently and moſt unwarrantably invaded; and if in this conteſt he tranſgreſſed any eſtabliſhed limit, it was none of thoſe which the conſtitution had hitherto acknowledged, but only ſuch as their uſurpations had compelled him to ſubmit to.

The Civil War. It is foreign to our purpoſe to enter into any detail of that calamitous war which enſued, and which terminated in the extinction of the monarchical government. It is neceſſary, however, to remark, that the parliament, hitherto ſo zealous for the utter abolition of Martial law while its exerciſe was conſtitutionally in the Crown, now found the neceſſity of aſſuming this power to themſelves in its utmoſt latitude, for the regulation of that army which had taken the field againſt their Sovereign.

An

An ordinance was accordingly framed for that purpoſe, and paſſed in Auguſt 1644 by both Houſes *, of which the following are the principal clauſes:

Ordinance for regulating the Army.

The Earl of Eſſex, captain-general of the Parliamentary forces, together with the Earls of Northumberland, Kent, Pembroke, Saliſbury, Mancheſter, Denbigh, and forty-nine others of the nobility, gentry, and principal officers, or any twelve of them, are appointed commiſſioners, with full power to hear and determine all ſuch cauſes as "belong to "military cognizance," according to the following articles; and to try, condemn, and execute all offenders againſt them, or otherwiſe puniſh them according to the nature of their offences.

"Art. 1. No perſon whatever ſhall go from London and Weſtminſter, or any part of the kingdom under the power of the Parliament, to hold any communication

* Parliamentary Hiſtory, Vol. 13. p. 270.

cation whatever, either perſonally, by letters, or meſſages, with the King, Queen, or Lords of the Council abiding with them, without conſent of both Houſes, or their committee for managing the war, or the Lord General or officer commanding in chief, on pain of death, or other corporal puniſhment at diſcretion.

" 2. Whoſoever ſhall plot, contrive, or endeavour the betraying or ſurrendering to the enemy, or ſhall actually betray and ſurrender, contrary to the rules of war, any cities, towns, forts, magazines, or forces under the power of the Parliament, ſhall be puniſhed with death.

" 3. No perſon whatſoever, not under the power of the enemy, ſhall voluntarily relieve any perſon being in arms againſt the Parliament, knowing him to be ſo, with money, victuals, or ammunition, on pain of death, or other corporal puniſhment at diſcretion; nor ſhall voluntarily harbour

harbour any ſuch, on pain of ſuch diſcretionary puniſhment.

" 4. No officer or ſoldier ſhall make any mutinous aſſemblies, or be aſſiſting thereunto, on pain of death.

" 5. No guardian or officer of any priſon, ſhall willfully ſuffer any priſoner of war to eſcape, on pain of death; or negligently, on pain of impriſonment, and further puniſhment at diſcretion.

" 6. Whoſoever ſhall voluntarily take up arms againſt the Parliament, having taken the national covenant, ſhall die without mercy.

" 7. Whatſoever officer or commander ſhall deſert his truſt, and adhere to the enemy, ſhall die without mercy.

" Further, the ſaid commiſſioners, or any twelve of them, ſhall be authoriſed to ſit, as often as they ſhall think fit, or ſhall be ordered by both or either Houſe of Parliament, in ſome convenient place in London or Weſtminſter, or

lines

lines of communication; and to appoint a Judge-Advocate, a Provoſt-Marſhal, and all other neceſſary officers.

"And further, all mayors, ſheriffs, juſtices, conſtables, bailiffs, &c. are required to aid the ſaid commiſſioners in the execution of the premiſes.

"Provided, that no member of either Houſe of Parliament, or aſſiſtants of the Houſe of Peers, ſhall be ſubject to the authority of the ſaid commiſſioners without conſent of both Houſes:—And the endurance of this ordinance is limited to four months, from eight days after the publication of the ſame."

The military power, in the hands of the Parliament, was now exemplified in a variety of orders iſſued from time to time for the conduct of the war; and among others, a regulation, that all ſoldiers and officers of the city's marching regiments ſhould inſtantly repair to their poſts, under pain of *immediate*

ate death to the common men, and a trial by Martial law to the officers*; an ordinance of a ſingular ſpirit from the ſame men who had denied the competency of puniſhing, by the Martial law, (unleſs when actually in ſight of an enemy), even the moſt atrocious act of mutiny, namely, ſoldiers murdering their officers.

Trials by Court-Martial.

Many trials by Court Martial were held under this ordinance of the Parliament. Sir Alexander Carew was tried for a deſign to deliver up the garriſon of Plymouth to the King, condemned, and beheaded. Sir John Hotham, formerly governor of Hull, was tried by the ſame court on five ſeveral charges†. 1. Betraying his truſt, and adhering to the enemy. 2. His refuſal to ſupply the Lord Fairfax with ammunition, to the great prejudice of the Parliament. 3. His ſcandalous

* Parliamentary Hiſtory, vol. xiii. p. 299.

† Whitlock's Mem. p. 110.

dalous words againſt the Parliament. 4. His endeavour to betray Hull to the enemy. 5. His correſpondence with the Queen, and his ſeeking to eſcape. He was condemned, on the teſtimony of thirty witneſſes, and the evidence of his own letters, to be beheaded on Tower-hill. The Houſe of Lords, on a petition from himſelf and his ſon, voted him a pardon, and deſired the concurrence of the Commons in that meaſure. They ſent, at the ſame time, their meſſenger, with a warrant to ſtay the execution. The Commons declared this procedure of the Lords to be moſt illegal: they reſolved, that they would not even take the ſubject of the pardon into conſideration; but paſſed a vote, that no order of either Houſe, without the previous conſent of the other, ſhould be effectual to ſtay the operation of juſtice: they then ſent their own order to the Lieutenant of the Tower for immediate execution.

ecution; and the priſoner was accordingly beheaded.

Mr L'Eſtrange (afterwards the well-known Sir Roger L'Eſtrange) was tried under the ſame ordinance, by the city Court Martial of London *, on the charge of his coming as a ſpy, without drum, trumpet, or paſs, from the King's quarters at Oxford, and tampering with the lieutenant-governor of Lynne-Regis, to deliver up that garriſon to the King. He was condemned to death, but petitioned the Parliament, on the ground that "he "had a commiſſion from his Majeſty for "reducing the town of Lynne, and had "been ever openly in arms for the King's "party." The Lords ordered the Judge-Advocate of the Court Martial to attend, and give an account of the proceedings; from which it appeared that the judg-

* Of this Court-Martial, L'Eſtrange ſays, "two prime men were a ſaleſman and an hoſtler." *Truth and Loyalty vindicated.* 1662.

ment of the court was founded on this reaſon, "That Mr L'Eſtrange's com-"miſſion was not the commiſſion of a "ſoldier, but a commiſſion of mere bri-"bery and corruption, to make a party "by offers of money and preferment." The Lords granted a reprieve *, and ſent the priſoner to Newgate, whence, after a confinement of four years, he made his eſcape, and got beyond ſeas. On the expiration of the ordinance under which theſe trials were held, another was framed nearly to the ſame purpoſe, but with the additional proviſo, that all the officers of the army ſhould be nominated and approved of by both Houſes, and ſhould, within twenty days of their appointment, ſubſcribe the national League and Covenant. The bill to this effect, however, met with ſome oppoſition from the

* Probably with the concurrence of the other Houſe, otherwiſe the late vote of the Commons muſt have been very inefficacious.

the Houſe of Lords; nor was the new ordinance for the regulation of the army paſſed till ſeveral months after, when the Lords at length gave their conſent, nine Peers entering their proteſt againſt it. By this ordinance forty officers, ſpecially named, together with ſome civilians and common lawyers, or any twelve or more of them, were appointed a Court-martial within London and Weſtminſter, to try all offenders againſt any of its regulations: but no execution of death was to follow on any of their ſentences till after ſix days notice to both Houſes of Parliament. The duration of this ordinance was limited to three months.

The Self-denying Ordinance.

The war was proſecuted for ſome time with alternate ſucceſs, and therefore promiſed no ſpeedy termination. The party of the Independents, whoſe object was decidedly the utter extinction of the monarchy, apprehending oppoſition to this plan on the part of Eſſex and others of the parliamentary

parliamentary generals, prepared a moſt artful meaſure for their removal, and for the entire new-modelling of the army. *The ſelf-denying ordinance* was framed, by which all members of Parliament were declared incapable of holding any military or civil employment; and from the prevailing influence of the Independents, the bill, after much conteſt, was paſſed by both Houſes. Eſſex, Warwick, Manchester, Denbigh, and many others, immediately reſigned their military commands. Cromwell, who himſelf had planned the meaſure, was of neceſſity included in its operation; and thus ought either to have loſt his ſeat in Parliament, or his commiſſion of Lieutenant-General: but this would have fruſtrated the views of the party. It was therefore moſt artfully contrived, that while he declared his intention of reſigning his commiſſion, and thus retaining his ſeat with the Commons, the new general in chief, Sir Thomas

Thomas Fairfax, ſhould petition the Parliament for a ſpecial exception in Cromwell's favour, on the ground that his ſervices with the army could not be diſpenſed with. The requeſt was granted; and thus Oliver Cromwell, who had an entire aſcendant over Fairfax, was in reality inveſted with the chief military command; while at the ſame time his influence in Parliament directed all its proceedings.

Treaty of Uxbridge.

At this very time, however, a negotiation was going on for a peace between the King and Parliament, contrary to the wiſhes of the ruling party in the latter, and therefore with ſmall proſpect of ſucceſs. The commiſſioners on both ſides met at Uxbridge, and conferences were held on certain ſpecial demands made by the Parliament, touching the important articles of *Religion*, *the Military power*, *and Ireland*. With reſpect to the military power, the King offered, that the arms of the

the ſtate ſhould, for *three years*, be entruſted to twenty commiſſioners, who ſhould be named either by mutual agreement between him and the Parliament, or one half by him and the other by the two Houſes; and he required, that at the end of that term, he ſhould be reinveſted with his conſtitutional authority over the militia and army. The commiſſioners of Parliament inſiſted, that the Parliament alone ſhould command the military force of the State; or at leaſt that this authority ſhould be declared to belong to them for ſeven years, at the end of which period it ſhould be ſettled by bill, or by common agreement between the King and Parliament. It was urged in reply, that this was nothing elſe than ſubmiſſion at diſcretion; and that unlimited power being thus veſted in the Parliament for ſo long a period, it would be eaſy for them ſo to frame the ſubſequent bill, as to keep poſſeſſion of it for ever.

ever. The demands with reſpect to Ireland were nothing ſhort of the abſolute ſovereignty of that kingdom, and the whole adminiſtration, civil and military. When it is added, that theſe demands, however exorbitant, were nothing more than *preliminaries* on the part of the parliament, which they required to be granted, before proceeding to diſcuſs the terms of a treaty, by which the King was required to ſacrifice all his friends and partizans to attainder and forfeiture, to relinquiſh the nomination of all the officers of ſtate and judges, and the right of making peace and war; it can excite no ſurpriſe that the negotiation ſhould break off with mutual diſguſt between the parties, and a ſpirit of greater alienation than had appeared at its commencement.

The Army New-modelled.

Mean time, in conſequence of *the ſelf-denying ordinance*, the army of the parliament was entirely new-modelled, by a total change of its officers, and the intro-

duction of a more rigorous diſcipline, in the enforcement of which, Religion was called in to the aid of the Military power. In the exerciſe of this regenerated army, preaching and prayer went hand in hand with the Martial duties; and every colonel and captain, in the intervals of actual ſervice, exhorted, catechiſed, and documented his flock in the great concerns of that ſpiritual kingdom, for whoſe intereſts they were taught to believe that they were now engaged. This policy had its effect. The diſcipline, the zeal, and even the courage of the parliamentary forces were conſpicuouſly ſuperior to thoſe of their opponents; and the entire defeat of the royal army in the battle of Naſeby terminated the war. The King was betrayed into the hands of the parliament, and ſeized ſoon after by the army, who, availing themſelves of the poſſeſſion of the perſon of their Sovereign, were rapidly proceeding to the eſtabliſhment of that military

deſpotiſm

deſpotiſm which was finally to ſubdue both the parliament and the nation.

In the regulation of this army, which was deſtined to atchieve enterpriſes of ſuch magnitude, Cromwell diſplayed in a ſignal manner both the political artifice and the vigour of his mind. When the war was at an end, the parliament, wiſhing to be rid of the army, propoſed a great reduction of the forces, and the embarkation for Ireland of a large portion of the reſidue. This meaſure would have proved fatal to the ambitious deſigns of Cromwell: he planned immediately a military parliament, which ſhould counteract and controul the civil. Together with a council of the principal officers, two men, termed *Agitators*, were elected from each company as their repreſentatives; and the purpoſe of this council was to collect and methodize the *grievances* of the army, to convey the ſenſe of theſe in an impreſſive manner to the parliament at Weſtminſter, and urge Agitators.

their ſpeedy and effectual redreſs. Poſſeſſed of the perſon of the King, the army boldly treated with the parliament, as rival powers, whoſe purpoſe, though not yet openly avowed, was known to each other to be the government of the nation. The military council impeached of high treaſon eleven of the parliamentary leaders, whom they regarded as enemies to their cauſe: they imperiouſly demanded that the Militia of London ſhould be entirely changed; and the populace petitioning againſt that meaſure, the army marched to the vicinity of the capital, with the purpoſe of forcing a compliance with all their demands. The parliament, ſenſible of its weakneſs, wiſely ſubmitted to its conquerors.

Mutinous Spirit of the Army quelled by Cromwell.

It was now neceſſary for the full accompliſhment of his plans, that Cromwell, maſter of the parliament, ſhould moderate and quell that ſpirit of arrogance in the ſoldiery, which, in the purſuit of that object

object now attained, he had hitherto been at ſuch pains to foſter. He therefore bent himſelf ſeriouſly to reform the diſorders of the army, and to that end exhibited an energy of diſcipline rigorous beyond all example under the former monarchy. The agitators, now known by the name of *Levellers*, extending their enquiries beyond the particular grievances of the army, had preſumed of late to enquire into the ſtate of the nation at large, to dictate certain improvements on parliamentary repreſentation, and to remonſtrate on the ſubject of religion, and on the inequality and injuſtice of the laws. Seditious petitions from ſeveral regiments were preſented to both houſes: Cromwell iſſued orders for the diſcontinuance of all meetings of the agitators: but finding that theſe were ſecretly continued, and that the whole army would ſpeedily be in a ſtate of anarchy and total inſubordination, he determined, by a daring exertion

of

of power, to remedy this alarming diſorder. Receiving intelligence of a rendezvous of ſeveral of the regiments, which had been called without authority of their commanders, he marched at the head of his troop to the place of meeting; and ſeizing with his own hand the moſt active of the leaders, he called a council of war upon the field: Three of them were tried and condemned to death, and one on whom the lot fell was inſtantly ſhot at the head of his regiment. It is remarkable, that at the time of this vigorous diſplay "of the juſtice of Martial "law," there was in fact no *legal* authority exiſting for its exerciſe; for the laſt ordinance had expired above a year before, and had never been renewed. But it does not appear that any queſtion was ſtirred on the ſcore of this irregularity; and a few ſuch examples reduced the whole army to ſubmiſſion and obedience. At this time Cromwell might with truth be ſaid

ſaid to have attained, though not the exterior ſymbols, yet the reality of abſolute power; ſince he had the entire command both of the parliament and of the army. The ſubſequent meaſures he purſued, in modelling the commons entirely to his purpoſe, of defeating all plans of accommodation with the King; annihilating the authority of the Upper Houſe; and finally bringing his Sovereign to the ſcaffold, were the natural and eaſy conſequences of the aſcendant he had obtained over all that remained of a legiſlative power, and the abſolute controul he poſſeſſed of the military force of the nation.

High Courts Martial.

After the extinction of the monarchical government, that ſelect aſſembly of the independent faction which ſtyled itſelf a parliament, paſſed a bill for eſtabliſhing a Court Martial "within the cities of Lon-" don and Weſtminſter, and the lines of " communication," which was to bear the name of "*The High Court of Juſtice;*" March 1649.

a

a ſignificant intimation that Martial law might then be deemed the paramount law of the ſtate. The levellers had again begun to exhibit a ſpirit of mutiny, and to diſquiet the parliament by remonſtrances on the ſtate of the nation. The high court of juſtice was therefore an uſeful engine for the maintenance of good order; and the diſpatch with which its proceedings were conducted, tended materially to facilitate the operations of the new government, by that ſalutary awe which attends all vigorous exertions of power.

May 14. 1649. In the ſame ſpirit of policy, well ſuited to the times, it was judged neceſſary to extend the laws of Treaſon far beyond the limits within which they had been confined during the monarchy. They were now declared to reach verbal offences, and even intentions, though not followed by any overt act. "To affirm the preſent govern-
"ment to be an uſurpation; to aſſert that
"the Parliament or Council of State were
"tyrannical

" tyrannical or illegal, to endeavour ſub-
" verting their authority, or ſtirring up
" ſedition againſt them," were all declared acts of high treaſon, by a ſtatute paſſed 14th May 1649 *. The power of arbitrary impriſonment, an engine of tyranny juſtly aboliſhed by the Petition of Right, was now reſtored to the Council of State; and a rigorous ſtatute paſſed for reſtraint of the preſs, prohibiting, under ſevere penalties, the printing of any books, pamphlets, or newſpapers, without a licence under the hand of the clerk of parliament, or, " in
" as much as they may concern the affairs
" of the army, under the hand of their
" ſecretary for the time."

Sept. 14. 1649.

Under the Protectorate of Cromwell, the government of England was entirely military and deſpotical. The Protector was inveſted with the right of making peace, war, and alliance, with the advice of his council, a ſet of officers entirely devoted to his

Military Nature of the Government.

N intereſt;

* Parl. Hiſt. vol. 19. p. 122.; Hume's Hiſt. of Eng. vol. 7.

intereſt; and the power of the ſword was placed in his hands jointly with the parliament if ſitting, or with the council in its intervals of meeting. A ſtanding army was eſtabliſhed of 20,000 foot and 10,000 horſe, of which he was the commander in chief. Theſe were not to be diminiſhed without the conſent of parliament; but in this article Cromwell aſſumed a negative voice. A meditated inſurrection of the royaliſts furniſhed him with a pretext for impoſing a tax of a tenth, to be levied on the whole property belonging to that party throughout the kingdom; and for the collecting of this impoſition, the Protector divided the kingdom into twelve *Military juriſdictions*, under as many *Major-Generals*, who were impowered to levy this decimation-tax from whom they pleaſed, and to enforce it by ſeizure of the perſons and diſtraining of the eſtates of all ſuch as were refractory *. Theſe twelve military governors

* Parl. Hiſt. vol. 19. p. 43.; Clarendon, b. 15.

governors had likewiſe a power of raiſing each of them a body of horſe and foot to be paid by the counties, and who ſhould be independent of the officers of the army, and ſubject only to the command of the Major-Generals. Thus the Protector had, in caſe of emergency, a ſecond army, either to aid the operations of the firſt, or powerful enough to controul it, if falling off from its implicit obedience to his will; a moſt artful arrangement, which completed the fabric of military deſpotiſm.

The Reſtoration

A government, whatever be its origin, acquires force from the mere circumſtance of its being eſtabliſhed. The protectorate, the commonwealth, or whatever may be its moſt proper appellation, might have continued for many years to be the government of England, had the ſucceſſor of Cromwell inherited his abilities. But the ſtructure which he had reared poſſeſſed no ſtrong principle of durability in itſelf; its parts were diſcordant, and its union reluctant;

luctant; as there was a ſilent, but earneſt ſtruggle between the prejudices and habits of the ancient monarchy, and the maxims and policy of the new arrangement. It was natural, therefore, that when the ſtrong hand was removed which bound together this vaſt machine, the fabric ſhould ſpeedily tend to diſſolution, even by the operation of its chief moving power. It owed its origin to military force; and the ſame force deſtroyed it. The army of Monk, ſuperior to that of Lambert, the General of the republican parliament, dictated to that aſſembly the vote for its own diſſolution; and the new parliament, uttering the ſenſe of the nation, immediately reſtored the monarchy.

The Army disbanded, Sept. 1660.

But this very experiment of the power of this formidable engine of revolution, excited a juſt apprehenſion and jealouſy of its miſemployment; and among the earlieſt reſolutions of the new parliament, was that for diſbanding the army. This meaſure was

was not cordially agreed to by the King, who conſidered a ſtanding army as a very neceſſary appendage of monarchy. But the Chancellor Clarendon, who knew the temper of thoſe veteran troops, convinced him, that inſtead of being a ſecurity of his government, there was the utmoſt danger of their ſhaking it to the foundation. A body of troops to the amount of 5000, was however ſtill kept on foot for guards and garriſons, an armament which was regarded by the people with an eye of jealouſy, as the rudiments of a ſtanding army.

A ſtatute immediately followed, aboliſhing the ancient military tenures, or the holding of lands by knight's ſervice *in capite*, which drew after it homage, ſervice in the King's wars, eſcuage, wardſhip, marriage, &c.; and all tenures, held either of the King or of any other perſon, were declared thenceforward to be changed into free and common ſoccage.

Military Tenures aboliſhed by 12. Car. II. c. 24.

This

This parliament, of which a great proportion was of the Preſbyterian party, was not diſpoſed to reſtore to the Sovereign the full extent of the ancient prerogative of the Crown. The regulation of the militia, the great ſource of former diſſention, was not reſigned to the King; and in ſeveral of the ſtatutes of this aſſembly, the proceedings of the Long Parliament were in effect juſtified and applauded.

The Military Power of the Crown ſolemnly recognized.

Of a very different temper was the Parliament which ſucceeded. They began by a ſolemn recognition of the ancient prerogative, by declaring it to be the ſole right of the Sovereign to command and regulate the whole military force of the realm. The ſtatute 13th and 14th Car. II. c. 3. entitled, *An act for ordering the forces*, &c. proceeds upon the following preamble: "Foraſmuch as within all his Majeſty's "realms and dominions, the ſole and "ſupreme power, government, command, "and diſpoſition of the militia, and of all "forces

" forces by ſea and land, and of all ſorts " and places of ſtrength, is, and by the " laws of England ever was, the un- " doubted right of his Majeſty and his " royal predeceſſors, Kings and Queens " of England; and that both or either of " the Houſes of Parliament cannot, nor " ought to pretend to the ſame; nor can, " nor lawfully may raiſe or levy any war, " offenſive or defenſive, againſt his Ma- " jeſty, his heirs or lawful ſucceſſors, " &c." And by the ſame ſtatute it was ordained, that all Lords-Lieutenants, Deputy Lieutenants, officers, and ſoldiers, ſhould take the following oath. " I do " declare and believe, that it is not law- " ful, upon any pretence whatſoever, to " take arms againſt the King; and that " I do abhor that traitorous poſition, that " arms may be taken by his authority " againſt his perſon, or againſt thoſe that " are commiſſioned by him in purſuance

" of

" of ſuch military commiſſions: So help " me God." The recent experience of the nation juſtified the propriety of impoſing on the *army* this explicit renunciation of the doctrine of *Reſiſtance*; but ſo ſtrongly had the current of opinion ſet in towards royalty, that a bill was ac-
1665. tually introduced into parliament for impoſing this oath upon the whole nation; and it was rejected as unneceſſary, only by a majority of three voices.

But this dawn, ſo auſpicious to the riſing influence of the Crown, was ſoon overcaſt. The expence of the Dutch war, and its abortive iſſue, weakened the popularity of Charles; nor did the expedience and good policy of the Triple Alliance reſtore him to the public favour. The dark councils of the *Cabal* urged him to throw off his dependence on his parliament, whoſe parſimonious ſupplies bore no proportion to his expenditure; and the ſtrong partiality he ſhowed towards the Catholics,

Catholics, undermined him in the affections of all the friends of the national church.

In the debate on the ſupplies for carrying on the war againſt France in 1678, the Commons openly expreſſed their apprehenſion that the troops and money to be voted for that oſtenſible purpoſe were to be employed by the King againſt the liberties of his people. In the ſame ſpirit, they ſoon after claimed a joint regulation and command of the militia; inſiſted that the King ſhould diſband the army; and in the articles of impeachment againſt the Treaſurer Danby, accuſed that miniſter of co-operating in the deſign of employing the ſtanding forces as an engine of arbitrary power for the ſubverſion of the government.

A ſucceeding Parliament exhibited a temper ſtill more hoſtile to the power of the Crown. The chimeras of the Popiſh plot, while they diſturbed the imaginations

of the people at large, excited freſh cauſe of diſguſt between the King and Commons, in the harſh meaſures purſued by the latter for the excluſion of the Duke of York from the ſucceſſion: and Charles, after the fruitleſs trial of many conciliatory expedients, diſſolved two ſucceſſive Parliaments, and ruled for the remainder of his life without the medium of that aſſembly.

In this reign, the military power of the Crown, though eſtabliſhed at firſt in the higheſt extent in which it had ever been ſince the reign of Eliſabeth, ſuſtained in the end ſome rude ſhocks from the alarmed jealouſy of the nation; and it is not improbable, that had the King, inſtead of this final reſolution of governing ſolely by his prerogative, aſſembled another Parliament, he muſt either have freely conſented to a very great diminution of his authority, or renewed the calamitous ſcenes of the laſt years of his father.

In

In the beginning of the reign of James II. the defeat of Monmouth's rebellion gave occaſion to ſome dreadful exertions of the Martial law, in the puniſhment of his adherents: nor was the evil materially remedied when, in conſequence of complaints of the illegality of thoſe proceedings, the King remitted the trial of ſuch offenders to the civil Courts of Juſtice: for theſe, it was alleged, had the ſame ſanguinary inſtructions; and the ſentences of Jefferies, with all the rigour and celerity of military execution, excited the greater abhorrence that they were iſſued from the tribunals of the law. The ſame rebellion furniſhed to the King a pretext for maintaining on foot a ſtanding army of 30,000 men, which he oſtentatiouſly diſplayed to the people in frequent reviews and encampments, to overawe and reſtrain all ſpirit of reſiſtance to the plan he ſeems to have formed of invading at once every part of the conſtitution. It was fortunate in the James II.

main that this plan became ſo ſoon apparent, and that the meaſures for its accompliſhment were taken with ſuch violence of indiſcretion, as to ſhorten the criſis of a diſeaſe which precluded all proſpect of recovery.

The Revolution.—*Declaration of Rights.*

By the *Declaration of Rights*, previouſly debated and voted in the Convention of the States, and ſolemnly aſſented to by the Prince and Princeſs of Orange, as the eſſential conditions on which they received the Crown, it was ſettled in poſitive terms, "That the raiſing and keeping "of a ſtanding army in time of peace, "*without conſent of Parliament*, is contrary "to law." This, with the declaration "That the ſubjects, if Proteſtants, may "have arms for their defence, ſuitable to "their condition, and as allowed by "law," are the only articles in that important deed regarding the military power of the Crown; which muſt therefore be conſidered as reſting in its eſſentials on the broad

broad baſis on which it was placed by the ſtatute 13th and 14th Car. II. c. 3.

In the firſt year of the reign of William and Mary, ſeveral of the Britiſh regiments had begun to ſhew ſtrong ſymptoms of diſaffection to the new government, from a jealous reſentment of the preference which the King was ſuppoſed to ſhew to his Dutch troops. Among the reſt, the Scottiſh regiment of Dumbarton, formerly commanded by the Duke of Monmouth, being ordered for embarkation to Holland, to replace a regiment of Dutch guards which the King wiſhed to retain in England, openly mutinied at Ipſwich, ſeized on the money appointed for their pay, diſarmed their officers, and declared their adherence to the abdicated Prince. The King thought proper to communicate this event to Parliament; but at the ſame time he uſed the ſhorteſt method of quelling the inſurgents, by marching againſt them three regiments of

of Dutch dragoons. The Parliament, deſirous of repreſſing this mutinous ſpirit of the army, but yet equally deſirous of preſerving to themſelves ſome check upon the exerciſe of the military power in the hands of the Sovereign, thought it expedient to interpoſe their authority, by arming him with a Mutiny-act, which ſhould be a warrant of unqueſtioned legality for the puniſhment of all military crimes.

The firſt *Mutiny-act*.

The firſt regular *Mutiny-act* was therefore paſſed on the 3d day of April 1689, for the endurance only of ſix months. It has however, from that time, with the exception of a ſingle interval of three years during the reign of King William, been annually renewed by Parliament, from the ſame motive of a wiſe and cautious policy; and thus the Military law executed by the Sovereign, but authoriſed, and in fact framed by the legiſlature, reſts upon a baſis of the moſt undiſputed legality.

We

We are intitled to conclude from the preceding detail, that amidſt all the fluctuations of government, and the changes of our conſtitution, in the alternate extenſion and retrenchment of the royal prerogative, the fundamental right of the Sovereign to *command the military force of the ſtate* has ever been acknowledged; unleſs in that calamitous period, when the whole frame of the conſtitution was unhinged and overthrown, and an anomalous tyranny ſubſtituted in its place, under the falſe title of a Republic. A ſtanding army, ever an object of jealouſy to a free people, is now clearly underſtood to owe both its exiſtence and duration ſolely to the will of Parliament; and while the ſupplies for its maintenance can be retained or granted at their pleaſure; while the Sovereign, even in the regulation of this army, acts only by their authority, and through their organ; it muſt be acknowledged, that there cannot exiſt a reaſonable apprehenſion

ſion of the abuſe of that power of the ſword, which is veſted in the only hands in which it could be exerciſed at once with uſeful energy, and with perfect ſecurity to the liberties of the nation.

CHAP.

CHAP. II.

Of the Authority of Courts-Martial.

WE have now ſeen, from the hiſtorical detail given in the preceding chapter, and the deduction in the cloſe of that detail, that the Martial law, as it exiſts at preſent in theſe kingdoms, forms a part of the law of the land; that it is enacted by the ſame authority which is the origin of all other ſtatutory regulations; and conſequently that it has the ſame poſitive obligation on thoſe whom it is intended to bind, as the common and ſtatute law has on the whole ſubjects of the realm.

Articles of War. By the Britiſh Mutiny-act, now annually renewed by Parliament, with ſuch occaſional amendments and alterations as to the wiſdom of the legiſlature may ſeem expedient, it is declared, "That it ſhall Section 18. "and may be lawful to and for his Ma-

" jeſty, to form, make, and eſtabliſh Ar-
" ticles of War, for the better govern-
" ment of his Majeſty's forces, which ar-
" ticles ſhall be judicially taken notice of
" by all judges, and in all courts what-
" ever."

The ſame proviſion is contained in the Mutiny-act for Ireland, which in all the material regulations reſpecting military diſcipline, is the ſame with the Britiſh ſtatute, and is, like it, annually renewed by the Parliament of that kingdom.

It follows from the terms of this enactment, that no offences or crimes againſt which any proviſion is expreſsly made in the Articles of War, ſhall be ſubject to any other puniſhment than that which is therein ſtatuted, nor ſhall it be in the power of any other courts or judges, to aſſume to themſelves a right of cognizance of any of thoſe offences properly military, and puniſhable only by a military tribunal.

It

It is further declared by the Mutiny-act, Section 19.
" That for bringing offenders againſt ſuch
" Articles of War to juſtice, it ſhall and
" may be lawful to and for his Majeſty,
" to erect and conſtitute Courts-Martial,
" with power to try, hear, and determine
" any crimes or offences by ſuch Articles
" of War, and to inflict penalties by ſen-
" tence or judgment of the ſame, as well
" within the kingdom of Great Britain,
" in Jerſey, Guernſey, Alderney, Sark,
" and Man, and the Iſlands thereto be-
" longing, as in his Majeſty's garriſon of
" Gibraltar, and in any of his Majeſty's
" dominions beyond the ſeas.—Provided
" always, that no officer or ſoldier ſhall,
" by ſuch Articles of War, be ſubjected
" to any puniſhment extending to life or
" limb, within the kingdom of Great Bri-
" tain, Jerſey, &c. for any crime which is
" not expreſſed to be ſo puniſhable by this
" act, nor for ſuch crimes as are expreſſed
" to be ſo puniſhable in any manner, or un-

" der any regulations which ſhall not ac-
" cord with the proviſions of this act."

Although it follows from theſe clauſes, that no crime which is mentioned and defined by the Articles of War, is puniſhable by a Court-Martial in any other manner than in that which is ſpecially directed by thoſe articles; yet it does not follow that there are no crimes puniſhable by a Court-Martial, but ſuch as are enumerated and declared to be puniſhable by the Articles of War. For it is in the power of his Majeſty, at all times, to make and iſſue Regulations for the army, independent of thoſe made by the Articles of War, and ſuche rgulations have all the binding force of Military law. The only limitation contained in the above clauſes of the Mutiny-act is, that a Court-Martial is not competent to inflict a puniſhment extending to *life or limb*, for any offence which may be declared puniſhable by ſuch regulations of his Majeſty, but which are not contained in the proviſions

ſions of the Mutiny-act. All inferior puniſhments may be therefore inflicted by a Court-Martial, for any breach of his Majeſty's regulations or orders reſpecting the army, though nothing touching the ſame ſhould appear in the Mutiny-act or Articles of War.

The powers of a general Court-Martial are therefore various and extenſive, both as to the nature of the crimes of which they may take cognizance, and of the puniſhments which it is in their power to decree. The ſeveral crimes are, as above obſerved, ſpecially enumerated in the Mutiny-act and Articles of War, as alſo in his Majeſty's printed regulations, which from time to time are iſſued from the war-office, and publiſhed and promulgated in general orders. But there are offences which admit of no preciſe definition, and yet which in the military profeſſion are of the moſt ſerious conſequence, as weakening and ſubverting that principle of honour,

on

on which the proper diſcipline of the army muſt materially depend. Of theſe a Court-Martial, which is in the higheſt ſenſe a court of honour, are themſelves appointed the ſole judges, or rather the legiſlators: For it is in their breaſts to define the crime, as well as to award the puniſhment. It is declared by the Articles of War, "that whatſoever commiſſioned offi-" cer ſhall be convicted before a general " Court-Martial, of behaving in a ſcanda-" lous, infamous manner, ſuch as is unbe-" coming the character of an officer and a " gentleman, ſhall be diſcharged from our " ſervice;" with this neceſſary proviſo, " that in every ſuch charge preferred a-" gainſt an officer for ſuch ſcandalous or " unbecoming behaviour, the fact or facts " whereon the ſame is grounded ſhall be " clearly ſpecified." For ſuch offences as admit of no preciſe deſcription, there is likewiſe proviſion made in the ſixth ſection of the Mutiny-act, which declares, "that

" it

" it ſhall be lawful for Courts-Martial, by " their ſentence or judgment, to inflict " corporal puniſhment, not extending to " life or limb, on any ſoldier, for immorali- " ties, miſbehaviour, or neglect of duty."

The perſons who are ſubject to Military law, and amenable to trial by a Court-Martial, are, in the terms of the Mutiny-act, (as now expreſſed), " Every perſon who " is or ſhall be commiſſioned or in pay as " an officer, or who is or ſhall be enliſted or " in pay * as a non-commiſſioned officer " or

Who are ſubject to Military Law.

All in pay or enliſted.

* That the bare circumſtance of being *in pay* as a ſoldier, was ſufficient to fix the military character, ſo as to render the perſon amenable to trial before a Court-Martial, was decided by a judgment of the Court of Common Pleas, on an application to that court for a prohibition againſt the execution of a ſentence of a general Court-Martial againſt Samuel George Grant, who, acting as a ſerjeant in recruiting for the ſervice of the Eaſt-India Company, enliſted two drummers, knowing them to belong to the Foot Guards. Grant pleaded that he was not amenable to Military law, as not being a ſoldier regularly enliſted and atteſted, though he did not deny his receiving pay as a ſerjeant in the 74th regiment. It was likewiſe ingeniouſly urged by his counſel, that he could only be

" or ſoldier." This includes all half-pay officers, and officers holding commiſſion by brevet, though receiving no pay. It appears that the earlieſt Mutiny-acts comprehended all theſe deſcriptions of perſons as under the regulation of Military law; but the incluſion of officers on half-pay and brevet officers being complained of, at a time when much jealouſy was entertained on the ſcore of the liberty of the ſubject, as being an unneceſſary extenſion of the Military law, the laſt part of the clauſe, which mentioned in expreſs words the

be liable to Military law while actually receiving pay, and that the laſt receipt of his pay did not prove that he was *actually in pay* at the time of this offence. But Lord Loughborough (now Lord Chancellor) delivering the opinion of the Court, decreed, that it was of no conſequence whether it did appear or not that Grant was in pay at the time, " for " a perſon in pay as a ſoldier is fixed with the character of a " ſoldier; and if he once becomes ſubject to the military " character, he can never be releaſed but by a regular diſ- " charge." *Proceedings of a General Court-Martial on the Trial of Serjeant S. G. Grant, printed by Egerton* 1792.

the incluſion of "officers on half-pay" was in the year 1748 omitted in the Mutiny-act, and has continued to be left out ever ſince. In the year 1786, however, after a long diſcuſſion of the queſtion in Parliament, it was decided that thoſe claſſes of officers ſhould again be included, and declared ſubject in the fulleſt extent to Military law. Wherefore, the clauſe in the Mutiny-act has ever ſince that time been for that purpoſe framed in the terms above mentioned, which include them in the general deſcription of "officers commiſſioned or in pay."

It had formerly been a matter of doubt, whether an officer or ſoldier, after being diſmiſſed or diſcharged from his Majeſty's ſervice, could be brought to trial before a Court-Martial, for a crime committed while he was in commſſion, or in pay; the terms of the before mentioned clauſe apparently confining the operation of the Military law to thoſe who are actually

Or who have been ſo at the time of the commiſſion of the crime.

either in commiſſion or in pay. The point came to be ſolemnly determined in the caſe of Lord George Sackville, who immediately on his return to England, after the battle of Minden, had been deprived by his Majeſty of all military command and commiſſion, but was not brought to trial for his conduct in that engagement till ſome months afterwards, in conſequence of his own demand of a Court-Martial. The queſtion was referred to the opinion of the twelve Judges, who, by their anſwer, unanimouſly declared, that "they ſaw no "ground to doubt of the legality of the "juriſdiction of a Court-Martial in thoſe "circumſtances *."

Troops in the ſervice of the Eaſt-India Company.

The Sovereign is likewiſe empowered by Parliament † to frame and eſtabliſh Articles of War for the regulation of the troops in the ſervice of the Eaſt-India Company: and it is declared by the Britiſh Mutiny-act, (§. 14.), that upon the trial of any officer

* 3d March 1760. † 27th Geo. II. c. 9.

ficer or ſoldier in the ſervice of the ſaid Eaſt-India Company, regard ſhall be had to the regulations and proviſions made in the 27th year of George II. for puniſhing mutiny and deſertion of officers in the ſervice of the ſaid Eaſt-India Company.

American Troops.

It is likewiſe provided by the Mutiny-act, (§ 72.), that all troops raiſed in any of the Britiſh Provinces of America, by authority of the reſpective governors or governments of the ſame, ſhall, while acting in conjunction with his Majeſty's Britiſh forces, be liable to the ſame Rules and Articles of War, and ſubject to the ſame trial and puniſhments by Courts-Martial.

Militia-men.

It is enacted, by ſtat. 26th Geo. III. c. 107. § 68. (an act engroſſing into one law all the previous exiſting ſtatutes relative to the militia), That during ſuch time as the militia ſhall be aſſembled for the purpoſe of being trained and exerciſed, all the clauſes, proviſions, matters, and things, contained in any act then in force for puniſhing

mutiny and deſertion, &c. ſhall be in force with reſpect to the militia, and all officers, non-commiſſioned officers, and privates of the ſame, in all caſes whatſoever; but ſo that no puniſhment ſhall extend to loſs of life or limb. The particular regulations reſpecting the militia are detailed at length in the ſame ſtatute. By § 88. of the ſame law, it is enacted, that every adjutant, ſerjeant-major, ſerjeant, corporal, drum-major, and drummer of the militia, ſhall at all times be ſubject to the Mutiny-act and Articles of War; and that it ſhall be lawful for the commanding officer or colonel of any regiment of militia, to direct the holding of Courts-Martial whenever the ſame is embodied, for the trial of the foreſaid perſons, for any offence committed during the time the regiment was not embodied; under the reſtriction before mentioned with reſpect to the extent of the puniſhment.

It

It is further enacted by the ſame ſtatute, ſect. 95. that in all caſes of actual invaſion, or imminent danger thereof, and in all caſes of rebellion or inſurrection, (the occaſion being firſt communicated to Parliament if then ſitting, or if not ſitting, publiſhed by proclamation), it ſhall be lawful for his Majeſty to order the militia to be embodied, and put under the command of ſuch general officers as he ſhall appoint, and to be led into any part of the kingdom: and all the officers and ſoldiers thereof ſhall, at ſuch times, be ſubject to the whole clauſes and proviſions of the Mutiny-act, in all caſes whatſoever. In ſuch times of invaſion, rebellion, and inſurrection, there is therefore no limitation with reſpect to the infliction of the higheſt puniſhments.

Courts-Martial cannot be compoſed jointly of militia and other officers.

It is moreover enacted by the ſame ſtatute, § 99. That no officer ſerving in the militia ſhall ſit in any Court-Martial upon the trial of any officer or ſoldier ſerving in any

any of his Majeſty's other forces; nor ſhall any officer in any of his Majeſty's other forces ſit in any Court-Martial upon the trial of any officer or private man ſerving in the militia.

Aliens. It is the opinion of Lord Chief-Juſtice Hale, that *Aliens* who, in conjunction with domeſtic traitors, endanger the ſafety of a ſtate, either by exciting rebellion and inſurrection among its native ſubjects, or ſtir them up to individual acts of treaſon, are puniſhable by Martial law. (Hale's Pl. Cor. c. 10. 15.) This is a topic which demands ſome inveſtigation. It is allowed by every writer on the Law of Nature and Nations, that although in general it is lawful in war to take all thoſe means of annoying an enemy which nature and occaſion afford, yet there are certain modes of hoſtile operation which the ſentiments of all poliſhed nations have agreed to reprobate as contrary alike to good policy and morality; and there-

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fore as evidencing a baſeneſs and treachery which removes their perpetrators from the condition of ordinary enemies. When, therefore, ſuch perſons are reduced by the fortune of war to the ſtate of priſoners, their conduct may juſtify a meaſure of revenge or puniſhment beyond what is authoriſed to be inflicted on ordinary captives. It is not common to put to death priſoners of war. They are detained in ſafe cuſtody, till they are exchanged by cartel, for an equal number of our ſubjects who may be in the hands of the enemy, or till the concluſion of a peace reſtores them to their liberty: and in the mean time they are treated with humanity. Such is the condition of ordinary captives. If, however, the ſubjects of a foreign power engaged with us in warfare, ſhall, either after a hoſtile invaſion of the country, or clandeſtinely inſinuating themſelves into its boſom, employ themſelves when there, in ſtirring up the ſubjects

to

to treaſon and rebellion againſt the Sovereign or government of the country, it is evident that ſuch perſons, when made priſoners, ought not to be conſidered as ordinary captives of war. There is no principle of juſtice that can condemn the forfeiture of the lives of ſuch baſe and treacherous enemies: but as the humane and liberal ſpirit of our conſtitution does not allow the taking away of life without a judicial ſentence, ſo it is cuſtomary to ſubject ſuch perſons, though aliens, (and as ſuch in the general caſe not amenable to our laws), to trial by Court-Martial; when, the facts being ſubſtantiated by proof, that ſentence is awarded which is juſtly due to the atrocity of the crime. The legality of ſuch procedure has been brought into queſtion; but no doubt can exiſt upon the ſubject, when we attend to the principles of Public Law; and in fact this very practice is a noble proof of the generous and free ſpirit of the Britiſh Conſtitution, which allows

allows even to the baſeſt of enemies the benefit of thoſe ſafeguards of life and liberty which it aſſures to its natural-born ſubjects.

Members of Parliament.

It has been queſtioned, whether the privilege of Parliament prevents any officer who is a member of either Houſe of Parliament, from being put under arreſt by his General, or tried by a Court-Martial. This is a ſubject of difficult diſcuſſion. If the privileges of Parliament were to be conſidered only in the light of immunities or benefits perſonal to the individual who claims them, it might with ſome reaſon be argued, that a member of Parliament, by the acceptance of a military commiſſion, ſubjects himſelf in all reſpects to the operation of the Military law, and renounces his privilege of freedom from perſonal arreſt; as it is competent to every perſon to renounce a benefit granted in favour of himſelf. But the privileges of Parliament belong to the Parliament as a body, and their

dignity and independence being intereſted in maintaining them inviolate, it would thence ſeem to follow, that no individual member has a right to renounce any of thoſe privileges, without conſent of the whole body of which he is a part. General utility, however, demands, that the ordinary courſe of juſtice ſhould not be impeded in the proſecution of crimes: and therefore it is an underſtood point of law, that the privilege of Parliament does not protect from arreſt in caſes of treaſon, felony, or breach of the peace. With reſpect to military crimes, the ſame political expediency demands that the courſe of juſtice ſhould not be obſtructed; but as the law has not expreſsly warranted the ſuſpenſion of parliamentary privilege in ſuch caſes, the ſafeſt courſe ſeems to be, that previouſly to the arreſt of any member, in order to trial for a military crime, notice ſhould be given to the Houſe of which he is a member, with a requeſt that, for the ſake

of

of public juſtice, they ſhould conſent to renounce the privilege in that inſtance, in ſo far as the body of Parliament is concerned, as the individual member is underſtood to have renounced it for himſelf, by the acceptance of a military commiſſion.

Officers under ſuſpenſion.

It has likewiſe been made a matter of doubt, whether an officer who is under a ſuſpenſion from ſervice for a limited time, and who ſhall in that interval commit any crime or offence in breach of the Mutiny-act or Articles of War, is ſubject to Military law, and amenable to a Court-Martial for his conduct: But this doubt may eaſily be ſolved on a moment's reflection. Suſpenſion, though it has the effect of depriving an officer for the time of his rank and pay, and putting a ſtop to the ordinary diſcharge of his military duties, does not void his commiſſion, annihilate the military character, or diſſolve that connection which ſubſiſts between him and

the Sovereign, of whom he is a ſervant. He retains his commiſſion, and is at all times liable to a call to duty, which would take off the ſentence. Suſpenſion being a puniſhment, is regulated in its effects by the tenor of the ſentence which inflicts it, and which, as it bears no more than the temporary deprivation of rank and pay, muſt be limited in its conſequence to thoſe effects alone, leaving every other particular of the military character entire. The ſuſpended officer remains, therefore, ſubject to the Military law, and is puniſhable for every breach thereof committed during his ſuſpenſion. He may therefore, in juſtification of his conduct, if he feels it impeached in the public opinion, demand an inveſtigation by Court-Martial; as happened in the caſe of Lord George Sackville, who, though at the time deprived of all military employ or command under his Majeſty, yet, having entreated a public inveſtigation of his conduct by Court-

Court-Martial, was allowed that benefit, which it is manifeſt could not have been granted to him unleſs he had been conſidered as ſtrictly amenable to Martial law.

Artillery Officers and Soldiers.

It appears that a doubt had ariſen, (though we cannot ſee upon what reaſonable foundation), whether under the aforeſaid general deſcription of perſons amenable to Military law, were comprehended thoſe who belong to the Trains of Artillery and Engineers; ſince it was judged neceſſary to declare in expreſs terms by the late acts for puniſhing mutiny and deſertion, "That all officers and perſons employed "in the Trains of Artillery, or the officers "ſerving in the corps of Royal Engineers, "or the officers and perſons ſerving in the "corps of Royal Military Artificers and "Labourers, or the Maſter Gunners and "Gunners under the ordnance, ſhall be "within the intent and meaning of the "act for puniſhing mutiny and deſertion, &c.

" &c. and ſubject to all the penalties and " puniſhments of the ſame."

Authority for holding Courts-Martial.

All general Courts-Martial are aſſembled under authority of the King; either expreſsly ſignified by warrant under the royal ſign-manual, or mediately, that is, by delegation of the royal authority to any general officer, having the chief command of a body of forces within any particular part of his Majeſty's dominions *, authoriſing him to convene general Courts-Martial for the trial of offences committed by any of the forces under his command. (See the form of his Majeſty's warrant, and likewiſe that iſſued by a Commander in Chief, Appendix, N° III. & IV.)

With the appointment or conſtitution of the Court-Martial, the royal authority ceaſes till that court ſhall have pronounced its judgment. The King can no more interfere with the procedure of Courts-Martial in the execution of their duty, than he

* Mutiny-act, § 5.

he can with that of any of the fixed courts of juſtice: nor even after the Court-Martial has pronounced its ſentence, is it in the power of the Sovereign to add to or alter that ſentence in any one particular, unleſs a recommendation to that effect ſhall be therein contained. The King, in virtue of his prerogative of mercy, may entirely remit the puniſhment which the court has awarded, or by diſapproving of the ſentence, he may order the court to ſit again, and to review their procedure and judgment; but he can no more decree any particular alteration of their ſentence, than he can alter the judgment of a civil court, or the verdict of a jury. Even with regard to the power of ordering a review of the ſentence, the Sovereign's powers are limited; for it is declared by the Mutiny-act, that no ſentence given by any Court-Martial, and ſigned by the preſident thereof, ſhall be liable to be reviſed more than once. The Sovereign's power of remitting the ſentence

of

of a Court-Martial again to the ſame court for their review, is founded on this *ratio*, that the ſentence itſelf is deemed incomplete till it ſhall receive the royal ſanction, or that of the perſon duly authoriſed by the Sovereign to approve of the ſame, and to enforce its execution.

Yet although the ſentence of a general Court-Martial is not alterable by the Sovereign, or by any perſon to whom the Crown has delegated the power of aſſembling thoſe courts, it is at all times competent to his Majeſty, and entirely conſiſtent with his conſtitutional authority, to remark on whatever may have been either omitted by the court, or improperly judged of by them, and which, from its blameable nature, calls for animadverſion. Such remarks on the proceedings of Courts-Martial, have the beſt effect in ſtimulating the care and diligence, as well as guarding the propriety and rectitude of thoſe tribunals.

As

If the Mutiny-act ſhould expire during the ſitting of a Court Martial.

As all procedure before a general Court-Martial is held in virtue of the powers veſted in his Majeſty by the Mutiny-act, which requires an annual renewal; ſo, if it ſhould happen that during the ſitting of a Court-Martial, and before a trial is finiſhed, the Mutiny-act ſhall expire, it was formerly held neceſſary that the court ſhould inſtantly ceaſe its proceedings, and that after the paſſing of the new Mutiny-act it ſhould be aſſembled *de novo*, under a new warrant from his Majeſty, or the Commander in Chief empowered by him *.

But

* This happened during the trial of Sir George Sackville in 1760. The court, after having made conſiderable progreſs in the trial, and heard the whole evidence in ſupport of the proſecution and a part of that which was adduced in defence, was diſſolved by the expiration of the Mutiny-act on the 24th of March 1760; but a new bill having paſſed both Houſes of Parliament, and received the Royal aſſent the ſame day, the court met next morning under a new warrant from his Majeſty. The Judge-Advocate General informed the court, that he had received the following opinions of the Attorney and Solicitor General,

But by the terms of the preſent Mutiny-act it is declared, that trials begun under a former act ſhall not be diſcontinued by its

to the queſtions which he had ſubmitted to their conſideration.

1. The members of the court and the Judge-Advocate muſt be ſworn again.

2. The charge muſt be exhibited *de novo*.

3. The witneſſes to be produced on the new trial muſt be called upon to give their teſtimony *viva voce*. But in caſe the proſecutor and priſoner are willing to ſave time, as the proof is taken in writing, if the depoſitions are read over to the witneſſes, and they are ſworn and confirm the ſame, it is ſufficient.

4. As this proceeding is a new trial, independent of the former, the court is at liberty to examine the witneſſes at large.

5. The proſecutor is at liberty to produce new witneſſes to ſupport the charge.

Theſe opinions evidently declared, that as the law then ſtood, the expiration of the Mutiny-act *pendente cauſa* had the effect of voiding and annulling the whole of the antecedent procedure, though they gave it to be underſtood, that provided the parties conſented, the former procedure might be recapitulated, to ſave the time of the court. The Judge-Advocate therefore propoſed to the priſoner, that the proceedings held under the former warrant ſhould be taken as the proceedings of the new Court-Martial; and that the depoſitions, being firſt read to and confirmed by the ſeveral witneſſes upon oath, ſhould be taken as good and

its expiration, but that it ſhall be lawful to proceed to judgment as if the act were ſtill in force under which the trial began *.

Number of the members of a general Court-Martial.

It is enacted by the 11th ſection of the Mutiny-act, that no general Court-Martial ſhall conſiſt of a leſs number than thirteen commiſſion officers, except the ſame ſhall be holden in Africa or in New South Wales, in which places ſuch general Court-Martial may conſiſt of any number not leſs than five, of whom none ſhall be under the degree of a commiſſion officer. No Field Officer can be tried in any Court-Martial, by any perſon under the degree of a captain.

and valid evidence in the cauſe. The priſoner accepted the propoſal; whereupon the depoſitions of the ſeveral witneſſes were read to them reſpectively, after being ſworn in due form, and they confirmed their ſeveral evidences. To remedy the inconvenience of this tedious and circuitous procedure, the alteration mentioned in the text has been made in the Mutiny-act.

* Mutiny-act, § 81.

It is in all caſes proper that there ſhould be more members appointed than the *minimum* required by the ſtatute, to guard againſt the accident of members falling ſick or dying, or being diſqualified, and therefore it is cuſtomary to appoint fifteen or ſeventeen members to compoſe the court. It is proper that the number ſhould be unequal, to avoid an equal diviſion. If, however, by the death or neceſſary abſence of a member of a Court-Martial, which originally conſiſted of an unequal number, the court ſhould be equally divided in opinion, the preſident, who in all caſes is entitled to vote, muſt in that caſe be allowed a double voice.

It is declared by the 12th ſection of the Mutiny-act, that no ſentence of death ſhall be given againſt any offender by any general Court-Martial, unleſs *nine* officers preſent concur therein, where the Court conſiſts of thirteen; and two thirds of the number preſent, where the Court conſiſts of

of more than thirteen *. The concurrence of two thirds in every capital ſentence, is likewiſe requiſite in Courts-Martial held in Africa or in New South Wales, conſiſting of a leſſer number than thirteen members.

Quality of the members of a general Court-Martial.

The preſident of every general Court-Martial muſt be a field-officer, unleſs where a field officer cannot be had;—but in no caſe whatſoever can he be under the degree of a captain; Mutiny-act, § 11. By the ſame ſection of the Mutiny-act it is enacted, that the preſident of a general Court-Martial ſhall not be the commander in chief, nor governor of the garriſon where the offender is to be tried. The reaſon of this diſqualification is probably, that the commander in chief, or governor of the garriſon, may often be the perſon under whoſe authority the court is held, and who

The Preſident.

* It has been erroneouſly aſſerted in ſome treatiſes on Courts-Martial, that the ſupernumerary members, or thoſe above thirteen, have no title to vote; a poſition of which the falſity is demonſtrated by the above ſection of the Mutiny-act.

who has a delegated power from his Majeſty to approve, and order into execution, or ſuſpend the ſentences of Courts-Martial called by his authority. He therefore having the power of review, it would be improper that he ſhould be a member of that court whoſe ſentences he is authoriſed to review *.

With

* In the trial of Macallum, Scrymgeour, Malloch, and others, for mutiny, before a general Court-Martial held in Edinburgh Caſtle in January 1795, by warrant of General Lord Adam Gordon, commander of his Majeſty's forces, caſtles, forts, &c. in North Britain; an objection was ſtated againſt the preſident of the court, Colonel Hugh Montgomerie, that he was Lieutenant-Governor of Edinburgh Caſtle, the garriſon where the court was held. It was anſwered on the part of the Crown: All diſqualifying clauſes muſt be ſtrictly interpreted: the Earl of Eglintoun was governor of the Caſtle of Edinburgh; the preſident of the Court-Martial was only Deputy, or Lieutenant Governor; to the latter, therefore, the diſqualification did not apply. The court repelled the objection. It was peculiar however to this caſe, that the objection was not ſtated, as it ought to have been, *in limine* of the proceedings, but reſerved till the trial was cloſed. The priſoners had been judicially aſked at the opening of the court, whether they had any objection to any of the members of the Court-Martial, and they had declared they had none; they had therefore

With reſpect to the ordinary members of a general Court-Martial, as the proviſions of the Mutiny-act extend both to the land-forces and marines, ſo it is declared, that in matters wherein any of his Majeſty's marine forces may be intereſted, the officers of the marines ſhall be aſſociated with officers of the land-forces, for the purpoſe of holding Courts-Martial; and that the members of the court ſo compoſed, ſhall take their rank according to the ſeniority of their commiſſions in either ſervice *. In like manner, it is provided, that when any of his Majeſty's land-forces are employed in the Eaſt Indies, Courts-Martial may be there aſſembled, compoſed jointly of the officers in the ſervice of the United Eaſt India Company, and of his Majeſty's land-forces; with this diſtinction, Ordinary members.

therefore homologated the juriſdiction, by pleading not guilty, and by ſtanding their trials. This circumſtance might have weighed with the court as an additional reaſon for repelling the objection.

* Mutiny-act, § 13.

tion, that when the trial is of any officer or ſoldier of the ſaid land-forces, regard ſhall be had to the regulations of the Britiſh Mutiny-act; and when the trial is of an officer or ſoldier in the ſervice of the Eaſt India Company, regard ſhall be had to the Mutiny-act paſſed for the puniſhment of offences committed by officers or ſoldiers in the ſervice of the ſaid Company *.

Authority for holding Courts-Martial.

A general Court-Martial is, as before obſerved, held, either by direct authority from his Majeſty under the royal ſign-manual, or by the authority of a commander in chief, having powers for that effect. In the former caſe, of a Court-Martial aſſembled under the direct authority of the King, the warrant uſually contains the names of the preſident and whole members who compoſe the court †; and it is directed to the Judge-Advocate General, or his

* Mutiny-act, § 14.

† See Appendix N° III.

his deputy. In the latter caſe, where the court is aſſembled by delegated authority, the preſident alone is appointed by name, by a ſeparate warrant addreſſed to himſelf, ſigned by the commander in chief, and orders are iſſued by the ſame authority for certain regiments to furniſh each a certain *quota* of officers of a ſpecified rank to be members of the court, and to return their names to the office of the Adjutant-General; thus leaving it to each regiment to chooſe the moſt proper perſons for that important duty.

The Court-Martial once conſtituted by proper authority, remains in exiſtence till it is diſſolved by the ſame authority which created it. The members, therefore, though the whole buſineſs is exhauſted by their pronouncing ſentence on the trials brought before them, are not at liberty to return to their ordinary duty, or leave the place where the court is aſſembled, without ſpecial permiſſion of the com-

The Court ſubſiſts till it is diſſolved.

mander in chief, till the court is finally diſſolved. It may be neceſſary for the court to reviſe its ſentence, or they may be required to intimate his Majeſty's pleaſure thereon, or that of the commander in chief, to the parties in open court.

Whether it can judge as to its own competence.

A general Court-Martial, aſſembled by ſpecial warrant, for the trial of a particular perſon named in that warrant, muſt diſcharge their duty, by taking cognizance of the crime, and pronouncing ſentence, either of condemnation, or of acquittal from the matter of charge. It has been doubted whether it is competent to a court ſo conſtituted, to exerciſe any judgment as to the legality of the trial, or the amenability of the priſoner to their juriſdiction. The naval Court-Martial appointed to try Captain Norris in 1744, for miſbehaviour and cowardice in the ſea-fight off Toulon, thought proper to avoid giving any ſentence either of condemnation or acquittal, by determining that they had no right to take

take trial of the charge, as the accuſed perſon had previouſly given up his commiſſion, and was not in his Majeſty's pay; although Captain Norris himſelf had deſired a Court-Martial, which had accordingly been granted to him. The proceedings of the court were called for in the Houſe of Commons, and referred to a committee, on whoſe report a motion was made and paſſed, that thoſe proceedings were arbitrary and illegal. Yet there would ſeem to be little doubt, that if the objection to the legality of the trial is ſelf-evident and inſurmountable, the court may ſuſpend procedure till the objection is canvaſſed by the proper authority; as, for example, if the priſoner is not ſubject to Military law, or if the crime ſhould be a civil offence, as murder, high-way robbery, rape, &c. falling under the cognizance of the ordinary municipal courts.

The Court muſt diſcuſs the whole charges.

A Court-Martial muſt exhauſt the whole charges that come before them, either by ſeparate opinions and judgment upon

each ſeparate article, or, where the ſeveral charges are connected, and form all together one offence, by a ſentence referring to the whole. It is not competent for the court, after taking trial of one or more of the articles of charge, and pronouncing ſentence on them, even though that ſentence ſhould award the *ultimum ſupplicium*, Death, to wave, on that account, the diſcuſſion of other articles of charge that may remain. The Court-Martial on the trial of Lieutenant-Colonel Cawthorne in 1796, on fourteen different articles of peculation and malverſation in duty, after finding the priſoner guilty of *ſix* of the moſt material of thoſe charges, and pronouncing ſentence accordingly, adjudging the priſoner to be caſhiered, and declared incapable of ſerving his Majeſty in any military capacity, reported their ſentence to the King, as humbly conceiving that the ends of public juſtice might thereby be ſatisfied; and they ſubmitted it to his Majeſty,

Majeſty, whether he might not think it unneceſſary to inveſtigate the remaining *eight* of the charges, which were of a nature ſimilar to that of the others which they had inveſtigated. His Majeſty iſſued his commands to the court, to proceed to examine and pronounce ſentence on all the remaining charges. It is of importance to the public, that every thing which has been made a matter of criminal accuſation, ſhould undergo a ſolemn deciſion by the proper tribunal, that it may have effectual operation in guarding others from falling into ſimilar practices.

The neceſſity of examining and diſcuſſing the whole articles of charge which are brought before a Court-Martial, does not preclude their exerciſe of judgment on the relevancy or irrelevancy of thoſe charges, or on their competency to become the ſubject of trial. It frequently happens, when charges are brought by a private proſecutor, involving the conſideration of various articles of

of alleged miſconduct or malverſation, that the proſecutor, either from over anxiety or error in judgment, ſpecifies certain matters as articles of charge which a Court-Martial may judge to be of a nature entirely blameleſs; and that although proved, or acknowledged by the priſoner, they infer no criminality. In ſuch a caſe, it is the duty of the court to diſmiſs the charge altogether, and throw it out of their conſideration, as *irrelevant*. In like manner, where a charge, however criminal in its nature, appears either from ſelf-evident circumſtances, or from facts emerging in the courſe of the trial, not to attach upon the party accuſed, it is the duty of the court to wave all examination into the ſubject, as being foreign to the perſon of the priſoner, and to declare ſo by their ſentence.

Precedence among the members of the court.

The members both of general and regimental Courts-Martial, when belonging to different corps, take the ſame rank which they

they hold in the army; officers of equal rank taking place according to the dates of their commiſſions. In Courts-Martial compoſed partly of officers of the regular and partly of fencible corps, the latter, as before obſerved, are on the ſame footing with the former; precedence being determined between them ſolely by the degree of the commiſſion, and where that is equal, by priority of date. Officers having brevet commiſſions prior in date to thoſe of the regiment in which they actually ſerve, may take place in Courts-Martial compoſed of different corps, according to the rank in their brevets; but in Courts-Martial held by their own regiment, they take rank only according to their commiſſion in the regiment. See the 15th ſection of the Articles of War, entitled *Rank*.

In Courts-Martial held in the Eaſt-Indies, and jointly compoſed of officers of the regular Britiſh forces, and of thoſe in the ſervice of the Eaſt-India Company, the former

former have the precedence of the latter when their rank is equal, though the commiſſions of the Eaſt-India Company's officers ſhould be of older date. *Articles of War, ſect.* 22. *art.* 2.

Time of ſitting.

Courts-Martial are not by law allowed to ſit longer than ſeven hours a-day; and no court can be aſſembled before eight o'clock in the morning, or ſit later than three o'clock in the afternoon, unleſs in caſes which require an immediate example. *Articles of War, ſect.* 16. *art.* 9.

Advantages of the mode of trial by Court-Martial.

The mode of trial by Court-Martial poſſeſſes all the benefit of trial by jury, and has moreover ſome advantages that are peculiar to itſelf. It has been frivolouſly urged, that the eſſence of the trial by jury, being that any man ſhall be tried by his peers or equals, non-commiſſioned officers and private ſoldiers, when tried by a Court-Martial, have not that benefit, as the Mutiny-act declares that no member of a Court-Martial ſhall be under the rank of

of a commiſſioned officer. But in truth this objection is founded entirely in a miſunderſtanding of the meaning of the words, "*trial by peers.*" By this expreſſion it is not meant that the perſons who compoſe the court ſhould be, in every reſpect, of the ſame rank and ſtation in life with the party who is to be tried, for this would in ſome caſes be an unattainable requiſite, and in many would be attended with much diſadvantage, inſtead of benefit, to the party accuſed. Some ſtations are ſo low, and ſo peculiarly characteriſed, that a jury of thoſe who were literally the peers, or of like condition with the priſoner, could not be aſſembled, nor would their character admit of their ſitting in judgment on the life of a fellow-creature. The true meaning of a *trial by peers* is, that thoſe who compoſe the jury are men, who, from their rank in life, have no privileges beyond what are enjoyed by the criminal whom they are

to try; who are ſubject to the ſame laws with himſelf, and are therefore under no bias or temptation to ſtretch them to his prejudice. The Military law, as contained in the Articles of War and Mutiny-act, regulates alike the conduct of the higheſt commiſſioned officer and the private ſoldier. The former is under no temptation to ſtretch or pervert that law to the prejudice of the latter, becauſe its ſanctions are alike explicit as to the duties of both; and the higher has no intereſt or advantage in abridging the privileges of the lower, but on the contrary a natural incitement to maintain their common rights.

The votes of a majority are deciſive.

Among the peculiar advantages of the mode of trial by Court-Martial, may be reckoned this, which is eſſential to its judgments, that they are the reſult, not of an unanimous concurrence of the opinions of all the jurors, but of a majority of them in caſes where the puniſhment does not affect the life of the criminal; and in capital

capital caſes, of nine out of thirteen, or two thirds of the jurors where the number exceeds thirteen. Where unanimity is requiſite, it is evident that in all caſes of difficulty there muſt be a conceſſion of the right of private judgment, and an implicit acquieſcence in the ſentiments of ſome leading members of the jury; otherwiſe matters could never be brought to an iſſue. But this conceſſion muſt often be attended with a violation of the dictates of conſcience to individuals; and in caſes where an individual, either from ſcruple of conſcience or a worſe motive, refuſes to make that conceſſion, an iniquitous verdict muſt be the conſequence *. In the ſentences of Courts-Martial, no conceſſion of the right of private judgment is neceſſary. All the members of the court have their unbiaſſed

* Some of the moſt judicious writers on the Engliſh law have reprobated this peculiarity of the conſtitution of the trial by jury. See Mr Emlyn's excellent preface to the State-trials.

judicative power; and even the influence of opinion is guarded againſt as far as poſſible, by the order in which the opinions and votes of the members are given; the youngeſt member of the court being required to give his opinion firſt, and the reſt following in progreſſive ſeniority up to the preſident, who votes laſt.

The evidence muſt be reduced into writing.

It is likewiſe a material advantage of the trial by Court-Martial, that the whole evidence is accurately taken down in writing, in preſence of the members of the court, who may at all times reſort to the written proceedings, which in the cloſe of the trial, and before ſentence, are always read over to them, and compared with and corrected by their own notes taken during the trial; ſo that every one of the jurors muſt be completely maſter of the whole body of the evidence.

Nor

Nor is it a ſmall advantage of this mode of trial, that the court being obliged by law to regularly adjourn its proceedings from day to day at an early hour, and even having that privilege at any hour, and for any reaſonable ſpace of time, when deliberation is thought requiſite, the attention of the members can never be haraſſed or worn out, nor their judgment precipitated or raſhly formed: it muſt in all caſes be the reſult of calm, attentive, and mature deliberation.

The Court may adjourn from time to time.

The Martial or Military law, as contained in the Mutiny-act and Articles of War, does in no reſpect either ſuperſede or interfere with the civil and municipal laws of the realm. On the contrary, it is expreſsly declared by the Mutiny-act, ſection 8, that nothing in that ſtatute ſhall extend or be conſtrued to exempt any officer or ſoldier whatſoever from being proceeded againſt by the ordinary courſe of law. Hence it appears, that ſoldiers are equally

The Military law does not interfere with the civil;

equally with all other claſſes of citizens, bound to the ſame ſtrict obſervance of the laws of the country, and the fulfilment of all their ſocial duties, and are alike amenable to the ordinary civil and criminal courts of the country, for all offences againſt thoſe laws, and breach of thoſe duties. It follows, therefore, that no crime for which the common or ſtatute laws of the country have provided a puniſhment, is cognizable before a Court-Martial; nor can the military power interfere to prevent the puniſhment of any ſoldier guilty of ſuch offences, or ſuperſede, by any judicial procedure in a Court-Martial, the ordinary effect of the laws of the country, unleſs in thoſe extraordinary emergencies, when the legiſlature may find it neceſſary to proclaim Martial law for the ſuppreſſion of rebellion, and to declare *per expreſſum*, that all crimes and offences committed in furtherance of ſuch rebellion, ſhall be tried in a ſummary manner

ner by Courts-Martial, notwithſtanding the ordinary courts of juſtice may at the time be open; a remedy of the moſt violent nature, and juſtifiable only by that abſolute neceſſity of circumſtances, when the *ſalus populi* becomes the *ſuprema lex* *.

But is required to give it aid.

The Military law is in fact ſo much ſubordinate to the civil, that the military power is expreſsly required to give its aid for carrying the civil laws into execution. The Mutiny-act † decrees, That if any officer, ſoldier, &c. ſhall be accuſed of any capital crime, or any offence againſt the perſon, eſtate, or property of any of his Majeſty's ſubjects, which is puniſhable by the known laws of the land, the commanding officers of all regiments, troops, or parties, are required to uſe their utmoſt endeavour to deliver over ſuch accuſed perſon

* See, in the Appendix, the ſtatute for the enactment of Martial law in the kingdom of Ireland, on occaſion of the late rebellion, (anno 1798.)

† Mutiny-act, § 9.

perſon to the civil magiſtrate, and to aſſiſt the officers of juſtice in apprehending ſuch offender; and this under a moſt ſevere penalty in caſe of refuſal to give ſuch aid, no leſs than being *ipſo facto* caſhiered, and declared incapaple of holding any civil or military office within the kingdom.

It is provided at the ſame time *, that no perſon who is acquitted or convicted of any capital crimes or offences by the civil magiſtrate, ſhall be liable to be puniſhed by a Court-Martial for the ſame, otherwiſe than by caſhiering. This exception is wiſely introduced for guarding the purity of the military character. It is not to be thence inferred, that a criminal tried and convicted by the civil power, is to be tried a ſecond time by a Court-Martial for the ſame offence; but upon proof being brought of his conviction of a crime before the civil court, which renders him unfit for or unworthy of the honourable profeſſion of

* Mutiny-act, § 10.

of a ſoldier, he may on that ground be caſhiered or diſmiſſed from his Majeſty's ſervice by a Court-Martial.

On the other hand, the ſentences of Courts-Martial are entitled to have their full effect and conſequences in judgment, as the deciſions and awards of the King's ordinary courts of juſtice. The Mutiny-act declares *, "That the Articles of War "eſtabliſhed by his Majeſty ſhall be judi-"cially taken notice of by all judges, and "in all courts whatſoever;" and this enactment is without doubt extended to all ſentences of Courts-Martial pronounced in conformity to thoſe articles.

The Civil power will likewiſe lend its aid to ſupply any deficiencies in the powers of Courts-Martial, where the end is the proper enforcement of military diſcipline and juriſdiction. Thus, for example, as the military juriſdiction does not extend to enforce the appearance of witneſſes who

And is aided by it in its turn.

* Mutiny-act, § 18.

are in a civil line of life, or to compel them to give their attendance in a Court-Martial, they will, in caſe of refuſal to obey the ſummons of the Judge-Advocate, be cited or ſubpœna'd for that purpoſe by the civil magiſtrate, on application by petition from the Judge-Advocate, ſetting forth the neceſſity of the caſe, and the importance of their teſtimony to elucidate the matters to be tried.

The civil power likewiſe gives its aſſiſtance to the military in the apprehending of deſerters; it being declared lawful for the conſtable, head-borough, or tything-man of any town or place, to apprehend, or cauſe to be apprehended, any perſon reaſonably ſuſpected to be a deſerter, and to bring him before a juſtice for examination; when, if, either by the party's confeſſion, or by the teſtimony on oath of one or more witneſſes, or the juſtice's own knowledge of the fact, the ſuſpected perſon is found to be an enliſted ſoldier, the

the juſtice is authoriſed to commit him to gaol, and give notice thereof to the Secretary at war, that he may be proceeded againſt according to law *. Any juſtice of the peace may likewiſe iſſue his warrant for the payment of a reward for the apprehending of deſerters, out of the land-tax money of the pariſh in which he is apprehended †: and heavy penalties are enacted againſt all who conceal deſerters, aſſiſt their eſcape, or receive, buy, or exchange their arms or cloaths.

So far, therefore, from there being any hoſtile interference between the civil and military powers of the ſtate, we ſee it moſt wiſely provided, that the moſt perfect *comitas* and harmony ſhall ſubſiſt between them; and the provinces of each being diſtinctly defined, they are each required to lend an amicable aid to the other in

* Mutiny-act, § 57. † Ibid. § 58.

carrying their proper juriſdiction and authority into full effect.

Time limited for the proſecution of offences.

The Military Law, while it authoriſes every meaſure neceſſary for the puniſhment of offenders, is moſt ſtrictly watchful to obviate every poſſible means of oppreſſion, and to guard the adminiſtration of juſtice from every taint of malice or of private reſentment. The Mutiny-act, therefore, with equal wiſdom and humanity, provides *, that offences which, at the time of commiſſion, have been deemed of too ſlight a nature for proſecution, ſhall not, at any diſtance of time, when the evidence of exculpation or alleviation may chance to be weakened, be urged as matter of arraignment againſt the offender, by declaring in expreſs words, that "no per- "ſon ſhall be liable to be tried and puniſh- "ed for any offence againſt any of the ſaid "acts or Articles of War, which ſhall ap- "pear to have been committed more than "*three*

* Mutiny-act, § 82.

" *three years* before the iſſuing of the com-
" miſſion or warrant for ſuch trial; unleſs
" the perſon accuſed, by reaſon of his ha-
" ving abſented himſelf, or ſome other
" manifeſt impediment, ſhall not have
" been amenable to juſtice within that
" period:—in which caſe he ſhall be li-
" able to be tried at any time, not exceed-
" ing two years after the impediment
" ſhall have ceaſed."

Indeed material juſtice requires, that all offences ſhould become the ſubject of inveſtigation and trial as ſpeedily as poſſible after the time of their commiſſion; nor is it conſiſtent either with candour or with equity to paſs over in ſilence the firſt ſlight deviations from duty, ariſing perhaps from ignorance or inexperience, thus tempting the incautious offender to greater enormities, and afterwards to bring the former in aggravation of his guilt; or even, as has been too frequently done, to make them parts of one accumulated charge againſt him.

him. A procedure of this kind can receive no apology from the affected plea of humanely overlooking ſlight offences; for theſe offences, if ſo trivial as to merit no animadverſion at the time, ought to be for ever buried in oblivion, not treaſured up for a future day of account; and if conſiderable enough to merit notice or cenſure, it is blameable in no mean degree to overlook them *.

The

* Of a procedure of this kind, which had occurred on two trials held at Edinburgh in March 1798, viz. that of Captain John Cameron, and Captain and Adjutant John Roy, on a variety of charges, the King expreſſed his pointed diſapprobation in the following terms, after approving entirely of the ſentences of the Court-Martial: "His "Majeſty, adverting to what has in ſome meaſure appeared "in the courſe of both theſe trials, has expreſſed his ex- "treme diſapprobation of keeping charges againſt an officer "or ſoldier in reſerve until they ſhall have accumulated, "and then bringing them before a general Court-Martial "collectively; whereas every charge ſhould be preferred "at the time when the fact or facts on which it turns "are recent, or if knowingly paſſed over, ought not, "either in candour or in juſtice, to be in future brought "into queſtion."

The ſentence of a Court-Martial, like that of every ſubordinate judicature, is ſubject to review, and may be appealed from by the party who conceives that he has ſuffered injuſtice. No ſentence of a Court-Martial is indeed complete, till it has been approved of by his Majeſty, or by a commander in chief having that authority delegated to him by ſpecial commiſſion. The appeal from the ſentences of Courts-Martial lies to the ſupreme Civil courts of law, as the courts of King's Bench and Common Pleas in England and Ireland *, and

The ſentence of a Court-Martial ſubject to review and prohibition.

* Inſtances are frequent, of proſecutions brought in the civil courts againſt the members of a Court-Martial, on the ground of an iniquitous ſentence. Among others, Mr Adye mentions the following. "In 1743, a lieutenant of marines was tried by a Court-Martial on board the Oxford man of war, in Port Royal in Jamaica, for diſobedience of his captain's orders, condemned to ſuffer an impriſonment of fifteen years, and rendered for ever incapable of his Majeſty's ſervice. The evidences brought againſt him were the depoſitions of a parcel of illiterate people, reduced into writing ſeveral days before he was brought to trial, which perſons were entirely unknown to him, he having

and the Court of Seſſion in Scotland *. It has likewiſe been ſuppoſed, that the proceedings of Courts-Martial are ſubject to review in either of the Houſes of Parliament: for in a debate in the Houſe of Commons on the Mutiny-bill, an amendment being propoſed to that clauſe of the oath to be adminiſtered to the members of a Court-Martial, binding them not to diſcover the opinion or vote of any particular member, "unleſs required to give evidence "as a witneſs by a court of juſtice," by adding to it theſe words, "or in both "Houſes of Parliament;" the amendment was rejected, on the ground, that they were virtually included under the denomination of

having never ſeen them, or heard of their names before; and upon his objecting to the evidence, he was brow-beat by the court, and loaded with curſes and imprecations. For which illegal proceedings, upon his return to England, he brought an action in the court of common pleas, (the ſentence had been previouſly remitted by the King), and obtained a verdict againſt the members of the Court-Martial for L. 1000 of damages." *Adye on Courts-Martial, p.* 64.

* Mutiny act, § 79.

of *courts of juſtice*. But as the clauſe of the Mutiny-act authoriſing redreſs againſt the ſentences of Courts-Martial ſpecifies only the courts of record, under which denomination are generally underſtood to be comprehended only the King's ordinary Courts of juſtice, and the Houſe of Commons is in no ſenſe to be conſidered as ſuch; it would ſeem that the above opinion is ill founded. Nor is there any example of ſuch judicative power being exerciſed by the Houſe of Commons. The proceedings of general Courts-Martial have indeed been called for in that Houſe, and have been cenſured as *arbitrary* and *illegal* *; but there is no inſtance of the reverſal of any ſentence by it as a court of juſtice, or award of damages for illegal proceedings. It may indeed be maintained

* The proceedings of a Naval Court-Martial held in the year 1745, for enquiring into the conduct of Captain Norris, were made the ſubject of diſcuſſion in the Houſe of Commons, and were cenſured, as *partial*, *arbitrary*, and *illegal*, April 30. 1745.

tained with more plauſibility, that the *Houſe of Lords*, as the ſupereminent court of appeal, has the power of reviewing the ſentences of Courts-Martial, as well as thoſe of all other courts of judicature within the kingdom: but we know of no inſtance where in practice this appeal has been directly brought from the judgment of a Court-Martial: and the ſafeſt courſe for any party feeling himſelf aggrieved by the ſentence of the military court, would be, to follow the mode pointed out by the Mutiny-act, by bringing a writ of error in the court of King's Bench in England or Ireland, or a ſuſpenſion in the Court of Seſſion in Scotland; from the judgment of which courts, the ultimate appeal is competent to the Houſe of Lords. This procedure is no contradiction of that clauſe of the Mutiny-act which declares, that "no ſentence of a "Court-Martial ſigned by the preſident "thereof, ſhall be liable to be reviſed more

"than

" than once;" for that clauſe only debars the reviſal of ſuch ſentence more than once by the ſame or any other Court-Martial.

The cauſes for which the ſentence of a Court-Martial may be brought under review of a ſuperior judicature, are the ſame which, in the Civil courts in England, authoriſe either the granting of a new trial, or an arreſt of judgment; that is to ſay, if the ſentence or verdict ſhall have been manifeſtly without, or contrary to evidence; or if it ſhall have been contrary to, or unauthoriſed by law; if the penal award be beyond meaſure exorbitant or ſevere; if the jury or judges have been corrupted, &c. But in all ſuch caſes, as the preſumption is ſtrongly in favour of the judgment, the ſuperior court will not entertain the appeal, or authoriſe any review of the proceedings, unleſs on the moſt pregnant or poſitive grounds for ſuppoſing that the merits have

not been fairly diſcuſſed, and that the deciſion is not agreeable to the juſtice and truth of the caſe *.

The ſentences of a Court-Martial may likewiſe become the ſubject of prohibition, and be arreſted in their execution, by interference of the King's Civil courts, on the ground of the Military court having exceeded its juriſdiction and powers; as if, for example, a Court-Martial ſhall have tried and condemned, for a military offence, a perſon not ſubject to the Military law. This exceſs of juriſdiction appears to be the only legal ground on which a prohibition can be iſſued; for it is no ground of prohibition, that a court has decided wrong in a matter clearly within its juriſdiction, although ſuch deciſion may be a juſt ground of appeal, or a ſufficient foundation for a review of the ſentence †.

As

* Blackſtone, b. iii. c. 24.

† This is a point of ſome difficulty, and on which the law-

As no ſentence of a general Court-Martial is complete until it has received the approbation of his Majeſty, or of the commander

The King may order a reviſal of the ſentence.

law-authorities are not entirely agreed. Sir William Blackſtone (book iii. c. 7.) holds, that beſides the ground of exceſs of juriſdiction, it is a ſufficient foundation for a prohibition, that a court, in handling matters clearly within their cognizance, have tranſgreſſed the bounds preſcribed to them by the laws of England; "as where they require "two witneſſes to prove the payment of a legacy, a releaſe "of tithes, or the like; in ſuch caſes a prohibition (ſays he) "will be awarded." But this opinion is powerfully controverted by Lord Loughborough, in delivering the judgment of the court of Common Pleas, in the celebrated caſe of Serjeant Grant, condemned by a general Court-Martial in 1792, for having been inſtrumental in inliſting two men for the ſervice of the Eaſt India Company, knowing them to be ſoldiers in the foot-guards. After ſtating two ſpecies of exceſs of juriſdiction which may be legal foundation for a prohibition, his Lordſhip thus proceeds: "Beyond "theſe two grounds it does not occur to me that any "other ground can be ſtated upon which the courts of "Weſtminſter-hall can interfere in the proceedings of "other courts, where the matter is clearly within their "juriſdiction; that they have decided wrong may be a "ground of appeal, it may be a ground of review, but "not a ground of prohibition. That has been diſtinctly "laid down both in this court and the court of King's "Bench, with reſpect to the court of prize; and it is "unneceſſary to quote authorities upon it, which leave it "without

mander in chief to whom that power has been ſpecially delegated, the King, or ſuch commander, diſapproving of the ſentence, may order the court to reconſider or review their proceedings, and recommend to them an alteration of their judgment: but as it is not conſiſtent with

" without a contradictory opinion. With reſpect to the " matter of evidence, where the courts proceed upon the " admiſſion of evidence that could not be admitted in a " court of law, or in limitation of evidence that would " be admitted in a court of law, the 12th article of the " complaint againſt the judges in the reign of James I. " and the anſwer to that article of complaint, makes diſ- " tinctly the law upon that ſubject. The 12th article of " complaint is, that the courts have granted prohibitions to " the eccleſiaſtical court, upon the ground, that the eccle- " ſiaſtical court would not allow the teſtimony of a " ſingle witneſs to be ſufficient in caſes where, in the " common-law court, the teſtimony of one witneſs would " be ſufficient; and their interference in it is the ſubject " of complaint. The anſwer the judges made to it is, " that in matters ſubject to the excluſive juriſdiction of " the eccleſiaſtical courts, as the ſetting out of tithes, " proofs of a legacy, and proofs of marriage, the courts " do not prohibit, though the rule of the eccleſiaſtical " court requires more evidence than the common law does " to eſtabliſh the fact; but that where incidentally a mat- " ter comes before them, there the court, upon ſuch a " ſurmiſe, will grant a prohibition."

with the royal powers, under the Britiſh conſtitution, actually to exerciſe any judicial authority, which belongs alone to the courts of juſtice; ſo his Majeſty can neither himſelf make any alteration on the ſentence of ſuch courts, nor commit that power to any other. All, therefore, that is competent for his Majeſty to do, if the ſentence of a Court-Martial ſhall not meet with his approbation, is to order the court to reviſe their proceedings: and even this power is limited; for the Mutiny-act declares, "that no ſentence given by "any Court-Martial, and ſigned by the "preſident thereof, ſhall be liable to be "reviſed more than once *."

The King's power of pardoning.

By the conſtitution of Great Britain, the King has the power of pardoning or remitting the ſentences of Courts-Martial, as of all other courts of juſtice. This branch of the royal prerogative is founded upon this *ratio*, that as the King repreſents

* Mutiny-act, § 7.

ſents the body of the public, and poſſeſſes by delegation all its powers and rights with regard to the execution of the laws, all breaches of the public law are conſidered as perſonal offences againſt the Sovereign; to whom therefore it belongs of right to pardon offences committed againſt himſelf: and as it is not competent for any court by its own authority to diſpenſe with the rigour of poſitive laws, however ſtrongly the particular circumſtances of a caſe may plead for ſuch diſpenſation; ſo it is of the utmoſt conſequence for the ends of juſtice, that an equitable power of this kind ſhould be lodged with the chief magiſtrate, from whoſe hands it is likely to be iſſued with the leaſt hazard or ſuſpicion of partial or impure motives. "It is (as Sir William "Blackſtone well remarks) one of the great "advantages of monarchy above any other "form of government, that there is a ma-"giſtrate who has it in his power to ex-

"tend

" tend mercy wherever he thinks it is de-
" ſerved, holding a court of equity in his
" own breaſt, to ſoften the rigour of the
" general law in ſuch criminal caſes as me-
" rit an exemption from puniſhment *."
The King's pardon may either be granted *ſimply*, which gives a complete diſcharge and immunity from the puniſhment decreed; or *conditionally*, which operates a commutation of a capital ſentence, or one inflicting a very high meaſure of puniſhment, into a milder. Of the latter we have daily examples in the caſe of felons who have received a capital ſentence, to whom the royal pardon is extended, on condition of tranſportation to ſome of the colonies and plantations, either for life or for a term of years: and the King's pardon is in like manner frequently granted to deſerters condemned to death by a Court-Martial, on condition of their en-

* Book iv. chap. 31.

liſting in certain regiments ſtationed abroad.

The royal pardon is frequently extended to thoſe who are condemned by a general Court-Martial, in conſequence of a recommendation to mercy contained in the ſentence of the court; who, although they may have found themſelves obliged by a ſenſe of duty, or in conſequence of the ſtrict letter of the law, to pronounce a penal ſentence, may yet be of opinion that there are alleviating circumſtances in the caſe which render the priſoner a proper object of the royal clemency. In ſuch caſe, the recommendation of the court is generally founded on the mention of thoſe favourable circumſtances *. But in all

* When the Court-Martial is held under the authority of a commander in chief who is authoriſed by the King to confirm and cauſe ſentences to be carried into execution without making a previous report thereof, or to ſuſpend them at his diſcretion; it is proper that every recommendation in favour of the perſon tried, whether for a mitigation of

all caſes whatever, the Sovereign has it in his power to grant either a conditional or a free pardon whenever it ſhall ſeem good to him, though there ſhould be no recommendation from the court to that effect.

of puniſhment, or for an entire remiſſion of the ſentence, ſhould be made to ſuch commander, requeſting that he will (in his diſcretion) ſolicit his Majeſty's clemency.

CHAP. III.

Of Regimental and Garriſon Courts-Martial.

COURTS-MARTIAL are either *general*, for the trial of the greater military crimes, or *regimental* or *garriſon*, for the cognizance of ſmaller offences.

Regimental Courts-Martial.

The Articles of War provide *, that the commiſſioned officers of every regiment may, by the appointment of their Colonel or commanding officers, hold regimental Courts-Martial, for the enquiring into ſuch diſputes or criminal matters as may come before them, and for the inflicting of corporal puniſhments for ſmall offences, and ſhall give their judgment by the majority of voices.

The

* Art. of War, § 16. art. 11.

The Articles of War likewiſe declare *, that no regimental Court-Martial ſhall conſiſt of leſs than *five* officers, excepting in caſes where that number cannot be conveniently aſſembled, when *three* may be ſufficient.

Where a ſufficient number of officers of the ſame corps or regiment cannot be had, the commanding officer, or the governor of the garriſon, may appoint officers from different corps to compoſe the regimental Court-Martial. The Articles of War and Mutiny-act contain no inſtruction or regulation with reſpect to the rank of theſe officers; but the uſual practice is to appoint a Captain as preſident, and four ſubalterns, (or two, if more cannot be conveniently aſſembled.) And in order that this duty may be equally ſhared, and all have the benefit of this neceſſary ſchool of inſtruction; it is cuſtomary in every regiment for the adjutant Members.

* Articles of War, § 16. art. 12. † Ib. art. 13.

jutant to keep a regular roſter for this as well as for all other regimental duties. The adjutant himſelf is frequently put upon this duty; and this practice has been condemned by ſome writers as irregular *, upon the ground that the adjutant is to a regiment in many reſpects what a ſheriff is to a county, and is appointed to ſuperintend the execution of every judgment, and the inflicting of all puniſhments: and it is argued, that as ſheriffs are expreſsly prohibited by *Magna Charta* from holding any pleas of the crown, or trying for any offences, ſo the ſame reaſon ſhould hold againſt the appointment of adjutants to ſit on Courts-Martial. But this reaſoning has little ſolidity. The only ground on which a ſheriff is diſqualified from the trial of crimes, is the expreſs prohibition of *Magna Charta*, which cannot be extended to any other officers than thoſe ſpecially mentioned.

* Adye, chap. iv.

mentioned. There is no ground in reaſon or in common ſenſe for preſuming that an adjutant ſhould be a more partial or iniquitous judge, becauſe it is his duty to ſee the ſentence put in execution: And the adjutant is generally not the leaſt qualified of the officers of a regiment to decide on matters of military diſcipline and duty.

Have no Judge-Advocate.

Regimental and garriſon Courts-Martial being competent only to the trial of the leſſer offences, or crimes which do not infer a capital puniſhment, and the caſes that come before them not giving room for any intricacy of deciſion, or doubtful queſtion of law, have not the aid of a Judge-Advocate to direct their proceedings. The preſident therefore, as well as the other members, have, on that account, much reſponſibility; and as the judgment of the court may come by appeal before a general Court-Martial, they ought to be particularly careful that its proceedings

proceedings be ſtrictly conformable to Military law and the practice of the army, as well as to the great principles of juſtice and equity. The members of the regimental or garriſon court are not ſworn, as thoſe of a general Court-Martial, nor is the evidence given upon oath: but the tribunal is on that account to be deemed more ſtrictly and peculiarly a court of honour; and the members are the more bound to act with impartial juſtice, as well as with lenity and moderation, that the feelings of duty, and the laws of honour and humanity, are their only ties of obligation.

Proceedings. The proceedings of all regimental and garriſon Courts-Martial muſt be accurately taken down in writing, either by the preſident, or by a member of court appointed by him; and the ſentence muſt be regularly ſigned by the preſident. It ought to be a further incentive to extreme caution with regard to the regularity and equity

equity of their proceedings, that an appeal lies from all their ſentences to a general Court-Martial, and that the members are liable to proſecution for an iniquitous judgment.

Sentence.

No judgment of a regimental or garriſon Court-Martial can be put in execution until it ſhall have been confirmed by the commanding officer (not being a member of the Court-Martial), or the governor of the garriſon where the court is held *.

Every inferior officer or ſoldier may have the benefit of a regimental Court-Martial.

For the redreſſing of all wrongs or injuries which an inferior officer or ſoldier may ſuſtain from his ſuperiors, the Articles of War † declare, that " if any in- " ferior officer, non-commiſſioned officer, or " ſoldier, ſhall think himſelf wronged by " his captain, or other officer commanding " the troop or company to which he be- " longs, he is to complain thereof to the " commanding officer of the regiment, who

* Art. of War, § xvi. art 11. † § xii. art. 11.

" is hereby required to ſummon a regi-
" mental Court-Martial, for the doing juſ-
" tice to the complainant; from which regi-
" mental Court-Martial, either party may,
" if he ſtill thinks himſelf aggrieved, ap-
" peal to a general Court-Martial." To check the frequency of ill-founded complaints, however, it is wiſely enacted by the ſame article, that " if, upon a ſecond hear-
" ing, (of the caſe), the appeal ſhall appear
" to be vexatious and groundleſs, the per-
" ſon ſo appealing ſhall be puniſhed at the
" diſcretion of the ſaid general Court-Mar-
" tial."

No commiſſioned officer amenable to a regimental Court-Martial.

It is material however to obſerve, that as no commiſſioned officer is properly amenable to the judgment or ſentence of a regimental Court-Martial, the court, on ſuch complaint and enquiry, can only pronounce their opinion whether the complaint is well or ill founded. If they declare the latter, the complainant muſt either acquieſce in that opinion, or, if he thinks

thinks himſelf aggrieved, follow the mode of appeal to a general Court-Martial above preſcribed. If the regimental court declare the complaint to be well-founded, the complainant may on that authority requeſt a general Court-Martial to take cognizance of the injury, and bring the offender to proper puniſhment.

CHAP. IV.

Of the Preliminaries to Trial before Courts-Martial.

SECTION I.

Of Principals and Acceſſories.

THE actual commiſſion of military crimes, ſuch as mutiny, deſertion, &c. and the adviſing, aiding, and abetting others in the commiſſion of thoſe crimes, are both puniſhable by the Martial law, and therefore all offenders, either as principals or acceſſories in the commiſſion of thoſe crimes, are amenable to the juriſdiction of Courts-Martial.

Diſtinction between principals and acceſſories.

The diſtinction between principals in the commiſſion of a crime, and acceſſories thereto, is diſtinctly pointed out by Sir

Sir William Blackſtone*. "A man may "be a principal in an offence in two de- "grees. A principal in the firſt degree is "he that is the actor, or abſolute perpetra- "tor of the crime; and in the ſecond de- "gree, he who is preſent, aiding and abet- "ting the fact to be done, which preſence "need not be an actual immediate ſtanding "by, within ſight or hearing of the fact; "but there may be alſo a conſtructive pre- "ſence, as when one commits a robbery "or murder, and another keeps watch or "guard at ſome convenient diſtance. An "acceſſory is he who is not the chief actor "in the offence, nor preſent at its perfor- "mance, but is ſome way concerned there- "in, either before or after the fact com- "mitted. An acceſſory before the fact, "is one, who, being abſent at the time of "the crime committed, doth yet procure, "counſel, or command another to commit "a crime. The procuring of a felony to "be

* Black. Com. b. iv. c. 3.

" be committed, though by the interven-
" tion of a third perſon, is being an ac-
" ceſſory before the fact. An acceſſory
" after the fact may be, where a perſon,
" knowing a felony to have been com-
" mitted, receives, relieves, comforts, or
" aſſiſts the felon: and generally any aſ-
" ſiſtance whatever given to a felon to
" hinder his being apprehended, tried, or
" ſuffering puniſhment, makes the aſſiſter
" an acceſſory. To buy or receive ſtolen
" goods did not at Common law conſtitute
" the being an acceſſory to the crime of
" theft, but was held a ſimple miſdemean-
" our: but now, by ſtatutes 5th Ann c. 31.
" and 4th Geo. I. c. 11. all ſuch receivers
" are made acceſſories."

Mutiny, principals therein.

The crime of mutiny, the higheſt offence of which a ſoldier is capable, becauſe it ſtrikes immediately at the foundation of all military ſubordination, and by neceſſary conſequence at the deſtruction of the ſtate, is by the Martial law puniſhable,

able, when committed in its greateſt extent, with death; and in its leſſer modifications, with ſuch other penalty as a general Court-Martial may judge adequate to the degree of the offence.

Acceſſories to Mutiny.

As the chief danger from this crime ariſes from its being ſhared or joined in by numbers, ſo it becomes a matter of high expediency, that the Military law ſhould guard moſt ſtrictly againſt the communication of a contagion of ſo dangerous a nature. It is therefore wiſely held to be the bounden duty of every ſoldier, to check this dreadful evil in its earlieſt ſtage, and not only to reſiſt and quell, if poſſible, all its active appearances, but to give immediate information of every mutinous purpoſe that may come to his knowledge; and the breach of this duty by inactivity or ſilence, being juſtly held to be an approbation and acquieſcence in the criminal deſigns, is declared to be puniſhable in the ſame degree with the actual crime. Thus, by

by ſect. 2. art. 4. of the Articles of War, it is enacted, that " any officer, non-com- " miſſioned officer, or ſoldier, who being " preſent at any mutiny or ſedition, ſhall " not uſe his utmoſt endeavour to ſuppreſs " the ſame, *or coming to the knowledge of* " *any mutiny, or intended mutiny*, ſhall not " without delay give information thereof " to his commanding officer, ſhall ſuffer " *death*, or ſuch other puniſhment as by " a general Court-Martial ſhall be award- " ed."

Miſbehaviour, abandoning poſts; acceſſo- ries therein.

In like manner, the high military crime of miſbehaviour in the face of an enemy, or the yet more atrocious, becauſe more wilful and deliberate offence, of betray- ing, abandoning, or delivering up any garriſon, fortreſs, poſt, or guard, commit- ted to the charge of an officer or ſoldier, is puniſhed capitally, or according to the meaſure of the crime, not only in the per- ſon who actually commits it, but alſo in the acceſſory, " who ſhall ſpeak words, or

" uſe

" uſe any other means to induce a gover-
" nor, commanding officer, or others, to
" miſbehave before the enemy, or ſhame-
" fully to abandon any garriſon, fortreſs,
" poſt, or guard, committed to their reſpec-
" tive charge," &c. *

So likewiſe, the crime of deſertion is puniſhable, not only in the perſon of the offender himſelf, but of the acceſſories. The ſixth ſection, art. 5. of the Articles of War, declares, that " whatſoever offi-
" cer, non-commiſſioned officer, or ſol-
" dier, ſhall be convicted of having ad-
" viſed or perſuaded any other officer or
" ſoldier to deſert our ſervice, ſhall ſuffer
" ſuch puniſhment as by the ſentence of
" a general Court-Martial ſhall be award-
" ed." And as by article 2. of the ſame ſection, a ſoldier's, or non-commiſſioned officer's enliſting himſelf in any other regiment, troop, or company, without a regular diſcharge from the regiment, troop,

Acceſſories to Deſertion.

* Articles of War, § 14. art. 21. and Mutiny-act, § 1.

or company in which he laſt ſerved, is held to be deſertion, and puniſhable as ſuch; ſo the acceſſories to this offence are deemed equally guilty with the principals, it being declared, that in caſe any officer ſhall knowingly receive and entertain ſuch non-commiſſioned officer or ſoldier, or ſhall not, after his being diſcovered to be a deſerter, immediately confine him, and give notice thereof to the corps in which he laſt ſerved, he, the ſaid officer ſo offending, ſhall, on being convicted thereof before a general Court-Martial, be caſhiered.

Harbouring deſerters, receiving clothes, arms, &c.

The harbouring or concealing of deſerters, purchaſing of their arms, clothes, &c. is, in the ſtricteſt ſenſe, an aiding or abetting of the crime; but it may either be a military or a civil offence, according to the ſtate or quality of the perſon who commits it. If committed by officers or ſoldiers, it is cognizable as a military crime by Court-Martial, and is puniſhable at the diſcretion of ſuch tribunal. If committed by

by perſons in a civil rank of life, it falls under a ſpecial proviſion of the Mutiny-act *, which declares, " That any perſon " who ſhall harbour, conceal, or aſſiſt any " deſerter from his Majeſty's ſervice, know- " ing him to be ſuch; or who ſhall know- " ingly detain, buy, or exchange, or other- " wiſe receive from any ſoldier or deſerter, " or any other perſon, upon any account or " pretence whatſoever, any arms, clothes, " caps, or other furniture belonging to " the King, or cauſe the colour of any " ſuch clothes to be changed; the perſon " ſo offending, ſhall, on conviction before " any juſtice of the peace, by the oath of " one or more credible witneſſes, forfeit " for every ſuch offence, the ſum of five " pounds, to be levied by diſtreſs, and ſale " of the goods and chattels of ſuch offen- " der; and in caſe there ſhould not be " ſufficient goods and chattels, he is to be " committed to the common goal, there

* Mutiny-act, § 59.

" to remain without bail for three months,
" or be publicly whipped, at the diſcre-
" tion of the juſtice."

Sending challenges.

The crime of giving or ſending a challenge, is puniſhable both in the principals and acceſſories; and of the latter, the Military law diſtinguiſhes various ſorts. The Articles of War * ordain caſhiering as the puniſhment of a commiſſioned officer who ſhall give or ſend a challenge, and corporal puniſhment for a non-commiſſioned officer or ſoldier guilty of the ſame offence.

Acceſſories thereto.

If any commiſſioned officer or non-commiſſioned officer, commanding a guard, ſhall knowingly ſuffer any perſon whatſoever to go forth to fight a duel, he ſhall be deemed a principal, and puniſhed as a challenger †.

All ſeconds, promoters, and carriers of challenges in order to duels, ſhall be deemed

* Articles of War, § 7. art. 2.

† Ibid, art. 3.

deemed as principals, and punished accordingly *.

As the practice of duelling is founded on mistaken sentiments of honour, and supported by false shame, it has been laudably endeavoured, in the framing of laws and regulations for the army, to check the practice, by counteracting the principle. After announcing the punishments for giving or sending a challenge, it is therefore declared by the Articles of War †, "That "whatsoever officer, non-commissioned "officer, or soldier, shall upbraid another "for refusing a challenge, shall himself be "punished as a challenger." And a clause is added, solemnly acquitting all officers and soldiers, of any disgrace or disadvantageous imputation, in having acted in obedience to his Majesty's orders, and done their duty, in refusing to accept of challenges.

Upbraiding for refusing a challenge.

All officers, of whatever condition, have power to quell all quarrels, frays, and disorders,

Quelling frays.

* Articles of War, § 7. art. 3. † § 24. art. 5.

diſorders, though even among the officers or ſoldiers of other regiments; and that by ordering the officers into arreſt, or non-commiſſioned officers or ſoldiers to priſon, until their proper ſuperior officers ſhall be acquainted therewith *. A great and extraordinary meaſure of authority is thus committed to every perſon who bears his Majeſty's commiſſion as an officer, and which he ought to conſider it to be his indiſpenſable duty to exerciſe, whenever occaſion ſhall require. The army is held to be one individual body, of which all the parts muſt co-operate together in harmony; and for the perfect attainment of this end, the authority of officers is not limited to their own regiments or corps, but is extended to every diviſion or department of the army, wherever it is neceſſary to ſuppreſs diſorder.

To enforce this ample authority it is declared by the Articles of War †, that whoever

* Articles of War, § 24. art. 4. † Ibid. ibid.

ever ſhall refuſe to obey ſuch officer, (though of an inferior rank), or ſhall draw his ſword upon him, ſhall be puniſhed at the diſcretion of a general Court-Martial.

Of a duty thus ſpecially enjoined, and powerfully enforced, the neglect or breach muſt be eſteemed a puniſhable offence. All officers and ſoldiers witneſſing quarrels, frays, and diſorders, without uſing the authority and powers thus conferred upon them, muſt therefore be conſidered as aiding and abetting the principal offenders; and although no ſpecial penalty is preſcribed for ſuch offence by the Articles of War, they may be arraigned on that general article* which ordains, that "all "crimes not capital, and all *diſorders and* "*neglects* which officers and ſoldiers may "be guilty of to the prejudice of good "order and military diſcipline, though "not ſpecified in the ſaid rules and arti-"cles, are to be taken cognizance of by "a

Neglect of this duty.

* Art. of War, § 24. art. 2.

" a general or regimental Court-Martial, ac-
" cording to the nature and degree of the
" offence, and to be punished at their dis-
" cretion."

In general, therefore, it may be held as Military law, that all accessories to the commission of crimes or offences, either by the furnishing of actual aid or assistance to the principals, or by silently witnessing or concealing the crime, harbouring or assisting the escape of the criminals, or barely neglecting that essential duty of every soldier, to promote to the utmost of his power the strict observance of good order and discipline, for which the Martial law invests him with full authority, is guilty of a positive crime, and amenable for the punishment thereof to the cognizance and judgment of a Court-Martial.

The accessory and the principal may both be arraigned and tried at the same time, unless they shall demand a separate trial.

trial. It ſeems indeed to be conſonant to juſtice, that the acceſſory ſhould be a party in the trial of the principal, in order that he may have an opportunity of controverting the guilt of his ſuppoſed principal, and by conſequence invalidating the charge againſt himſelf.

Notwithſtanding it is an admitted principle in the cognizance of all crimes, that no man ſhall be brought twice into trial for the ſame offence; and there is an expreſs proviſo to that effect in the Mutiny-act; yet, although a man may be acquitted on his trial as an acceſſory, there is nothing to prevent his being afterwards arraigned and tried as a principal; as the offences are diſtinct, and the leſſer cannot poſſibly involve the greater. But it is matter of ſome doubt (ſays Sir William Blackſtone) whether, if a man be acquitted as a principal, he can be afterwards indicted as acceſſory before the fact, ſince thoſe offences are often very nearly allied, and therefore

an acquittal of the guilt of one, may be an acquittal of the other alſo. But it is clearly held, that one acquitted as principal may be indicted as an acceſſory *after* the fact; ſince that is always an offence of a different ſpecies of guilt principally tending to evade the public juſtice, and is ſubſequent in its commencement to the other *.

SECTION. II.

Of the Apprehending of Criminals in order to Trial.

Impriſonment in order to trial.

THE Articles of War direct *, that whenever any officer or ſoldier ſhall commit a crime deſerving of puniſhment, he ſhall, by his commanding officer, be put in arreſt: if a non-commiſſioned officer or ſoldier, he ſhall be impriſoned, until he ſhall be either tried by a Court-Martial, or lawfully diſcharged by a proper authority.

It

* Black. Com. b. iv. c. 3. † § xvi. art. 16.

Deſerters may be apprehended by the civil magiſtrate.

It was formerly ordained by a clauſe of the Mutiny-act, that the civil power, as well as the military, ſhould have authority to apprehend all offenders againſt Martial law; a clauſe apparently of high propriety, as military crimes are no leſs offences againſt the ſtate, than civil delinquencies; and the moſt perfect co-operation ſhould take place between the two powers, for the enforcement of obedience to their reſpective laws. This clauſe however has been omitted in the late Mutiny-acts; and the interference of the civil power for the apprehending of military offenders is limited to the caſe of deſerters. With reſpect to theſe, the Mutiny-act ordains *, that it ſhall be lawful for the conſtable, headborough, or tything-man of the town or place where any perſon reaſonably ſuſpected to be a deſerter, ſhall be found, to apprehend, or cauſe him to be apprehended, and to be brought before any juſtice of the

* Sect. 57.

peace living in or near ſuch town or place, who hath power to examine him; and if it ſhall appear, by his own confeſſion, or by the oath of one or more witneſſes, or be conſiſtent with the juſtice's own knowledge, that the ſuſpected perſon is an enliſted ſoldier, the juſtice is authoriſed to commit him to the county goal or the houſe of correction, and to give notice thereof to the ſecretary at war. It is likewiſe ordained by the ſame ſection of the Mutiny-act, that the keeper of the goal or houſe of correction ſhall receive the full ſubſiſtence of ſuch deſerter during the time he is in cuſtody, but no other fee or reward. And the keepers of all goals or houſes of correction are further required to receive and confine ſuch deſerters, while on the road from the place where they were apprehended, to the place where they are to be conveyed, without any fee or reward whatever.

Although

Nature and degree of arreſts.

Although the Martial law makes no mention of any difference in the nature of arreſts in order to trial, a difference is eſtabliſhed by the cuſtom of the army, according to the degree or meaſure of the crime: an officer accuſed of a capital crime, or any offence of which the penalty is ſo ſevere as to afford a natural temptation to eſcape from juſtice, ought to be detained in a ſtate of confinement as ſecure as the cloſeſt civil impriſonment. If the offence is of a lighter nature, the preſumption is, that the officer whoſe character is thus impeached, muſt be ſolicitous to obtain a judicial inveſtigation of his conduct; and he is therefore generally allowed to be in arreſt at large, that is, to walk about within certain limits without his ſword, on his word of honour to await the iſſue of a trial, or his enlargement by proper authority. The degree and meaſure of the arreſt muſt however be entirely at the diſcretion of the commanding officer,

officer, who will in all caſes regulate his conduct by the particular circumſtances, and by the dictates of propriety and humanity.

Time of confinement.

The Articles of War * decree, that no officer or ſoldier who ſhall be put in arreſt or impriſonment, ſhall continue in his confinement more than eight days, or until ſuch time as a Court-Martial can be conveniently aſſembled. The latter part of this clauſe evidently allows a latitude which is capable of being abuſed: but as in a free country there is no wrong without a remedy, the military law preſcribes a mode of redreſs for all officers or ſoldiers who conceive themſelves injured by their commanding officer †, which muſt always be ſufficient for the reſtraint of every act of material injuſtice or oppreſſion.

Penalty of refuſing to keep priſoners, or releaſing them without orders.

It is declared by the Articles of War ‡, that no officer commanding a guard, or Provoſt-

* Articles of War, § 16. art. 17. † Sect. 12.

‡ Sect. 16. art. 18, 19.

Provoſt-Marſhal, ſhall refuſe to receive or keep any priſoner committed to his charge by any officer belonging to his Majeſty's forces, provided the latter deliver an account in writing, ſigned by himſelf, of the crime with which the priſoner is charged. Nor ſhall any officer commanding a guard, or Provoſt-Marſhal, preſume to releaſe any priſoner committed to his charge, without proper authority for ſo doing; nor ſhall he ſuffer any priſoner to eſcape, on the penalty of being puniſhed for that offence, by the ſentence of a Court-Martial.

Names of priſoners to be returned.

Every officer or Provoſt-Marſhal, to whoſe charge priſoners are committed, is likewiſe required*, within twenty-four hours after ſuch commitment, or as ſoon as he ſhall be relieved from his guard, to return in writing to the commanding officer of the priſoner's regiment, or to the Commander in chief, the names of ſuch priſoners,

* Articles of War, § 16. art. 20.

priſoners, their crimes, and the names of the officers who committed them, on penalty of being puniſhed for diſobedience or neglect, at the diſcretion of a Court-Martial.

Thus, the liberty of the ſubject under Military law, in as far as is conſiſtent with the ends of material juſtice, ſeems to be guarded with precautions little inferior in their power and efficacy, to thoſe which ſecure perſonal liberty under the civil laws of the ſtate.

Penalty of breach of arreſt.

The penalty of an officer's breaking his arreſt, or leaving his confinement, before he is ſet at liberty by the officer who confined him, or by a ſuperior power, is declared to be caſhiering by ſentence of a general Court-Martial *.

* Articles of War, § 16. art. 21,

CHAP.

CHAP. V.

Of the Procedure and Form of Trial before a General Court-Martial.

SECTION I.

Of the Accuſation or Charges.

The Proſecutor.

AS the King is the proſecutor of all crimes, which are offences againſt the public peace, of which he is the conſervator; ſo is he in a more particular manner the proſecutor in military offences, which are violations of his own authority as head of the army. In all trials, therefore, before a general Court-Martial, the Judge-Advocate ſuſtains the proſecution in the name of the King; and that, either ſolely, for the cognizance of a breach of the public Military law, as for the trial of mutiny,

deſertion, &c. or in concurrence with a private proſecutor, who is *generally* a party who has individually ſuffered an injury by the aggreſſion and crime of the priſoner to be tried: We ſay *generally*, becauſe it ſometimes happens, that, for the ſake of public juſtice, the individual who, from accidental ſituation, is beſt acquainted with the particular circumſtances of the crime to be tried, (though it be of a public nature), and who informs as to the matter of accuſation, is requeſted to ſuſtain in court the character of proſecutor jointly with the Judge-Advocate, and to conduct the examination of the evidence upon the part of the Crown: A duty this of great moment, though not without its ſhare of painful feeling to the individual who is called upon to diſcharge it: But feelings of private concern muſt ever give way to the great ends of public juſtice; and the ſoldier or officer is unworthy of the character which he bears, and indeed materially culpable, who

who does not conſider, that the allegiance he owes to his Sovereign, and the maintenance of Military law and diſcipline, are his paramount obligations, to which he is bound to ſacrifice every ſubordinate and ſelfiſh conſideration.

A proſecution may be brought in a Court-Martial, at the ſuit of a perſon who is himſelf not ſubject to military juriſdiction, provided the offence be of a military nature, and committed by a perſon under the Military law *.

The charges or indictment.

Although the term indictment, in the limited ſenſe in which it is underſtood by the writers on the Law of England, is peculiar to the courts of Civil juriſdiction, being, as Sir William Blackſtone defines it, "a

* The ſurgeon of a regiment was lately (December 1799) proſecuted before a general Court-Martial at Norwich, *at the ſuit of the Coroner*, for neglect of duty, in not paying proper attention to a ſick ſoldier of that regiment, who died of a dyſentery in the hoſpital. The defendant was honourably acquitted by the Court-Martial, and the ſentence was approved of by his Majeſty.

" a written accuſation of one or more per-
" ſons of a crime, or miſdemeanor, pre-
" ferred to, and preſented upon oath by a
" grand jury;" yet in its general and proper meaning, it is, *The libel or ſpecification of a crime, of which a perſon ſtands accuſed, and againſt which he is called to defend himſelf before a competent court.* Agreeably to this definition, the *charge* or *charges* on which a priſoner is to be tried before a Court-Martial, are, properly ſpeaking, an indictment, and muſt in their *ſubſtance* poſſeſs all its eſſential requiſites, although in *form*, the military judicial procedure is leſs fettered by peculiar and cuſtomary ſolemnities of expreſſion than the civil.

Thus, in whatever terms the accuſation in the charges may be conceived, it is neceſſary,

1*ſt*, That the crime or offence be clearly ſpecified and expreſſed; and the act or acts of guilt pointedly charged againſt the priſoner.

2*d*,

2*d*, That the time and place, when and where the crime was committed, be ſet forth with all poſſible certainty and preciſion.

As all crimes admit of certain degrees and modifications of guilt, it is eſſentially neceſſary to the ends of juſtice, that any priſoner who is to undergo trial for a crime, ſhould be appriſed of the extent and degree of guilt with which he ſtands charged, and of the particular facts of which the proſecutor means to bring evidence againſt him, in order that he may have a fair opportunity of invalidating the proof of thoſe facts by contrary evidence. As, therefore, in a civil court of juſtice, it would not be ſufficient to ſtate in the indictment that the party is guilty of murder, without ſpecifying the particular act of killing or ſlaying a certain perſon, and the manner in which the ſlaughter was committed; ſo in trials by Court-Martial the charge muſt contain a diſtinct ſpecification of the criminal act or acts. Thus, if

Specification of the acts of crime.

if the crime is mutiny, it is not ſufficient that the charges bear that A. B. is guilty of mutiny; the particular acts of mutinous conduct in the priſoner muſt be clearly and diſtinctly enumerated; as entering forcibly and with arms into a guard-houſe and releaſing a priſoner; uſing certain ſpecified traitorous expreſſions againſt his Majeſty; or contemptuous and diſreſpectful language towards a ſuperior officer; or offering ſuch and ſuch acts of violence againſt him; urging his fellow ſoldiers to reſiſt military orders; perſuading them to revolt to the enemy, &c. In like manner, if the crime is abandoning or betraying a garriſon, fortreſs, or poſt, not only muſt the particular poſt, fortreſs, or garriſon be diſtinctly ſpecified, but the ſpecial act of treachery deſcribed, and the manner in which it was committed *.

There

* There muſt (ſays Judge Hawkins) be a *certainty* of the offence committed, and nothing material ſhall be taken by intendment or implication; *but the ſpecial manner of the whole fact* ought to be ſet forth with certainty." 2. Haw. 225. 227.

There is one claſs of offences, in which a diſtinct ſpecification of the criminal act or acts is more particularly neceſſary, and is indeed ſo eſſential as to be poſitively enjoined by the Articles of War. It is ordained by article 22. of the 16th Sect. Art. of War, that " whatſoever commiſſioned " officer ſhall be convicted before a gene- " ral Court-Martial of behaving in a ſcan- " dalous infamous manner, ſuch as is un- " becoming the character of an officer and " a gentleman, ſhall be diſcharged from " his Majeſty's ſervice." As this is a crime of great latitude of interpretation, and admitting both of an indefinite variety in the acts from which ſuch miſbehaviour may be inferred, and poſſibly often of diſcrepancy of opinion with regard to the degree of guilt that may be attached to ſuch acts; it is evident that much injuſtice would be done to any priſoner who ſhould be arraigned before a Court-Martial upon a general charge of " ſcan-

" dalous

" dalous or infamous behaviour, unbe-
" coming the character of an officer and
" a gentleman," without any ſpecification of the facts which were deemed to conſtitute ſuch groſs miſbehaviour, and which poſſibly the priſoner, if appriſed of them, might either totally diſprove, or ſhew that they admitted of ſuch extenuation from circumſtances as might alleviate, or altogether exculpate from the charge. To this Article of War the following wiſe and equitable clauſe is therefore ſubjoined.
" Provided, however, that in every charge
" preferred againſt an officer for ſuch
" ſcandalous or unbecoming behaviour,
" the fact or facts on which the ſame is
" grounded ſhall be clearly ſpecified."

As this is the only inſtance of a military crime in which the Articles of War particularly enjoin that the charge ſhall contain a clear or diſtinct ſpecification of the facts, it might perhaps be argued, that in other crimes ſuch ſpecification is not eſ-

ſentially

ſentially neceſſary: and it muſt be owned that in practice it has too frequently been diſpenſed with, and a general charge allowed, as of mutiny, diſobedience of orders, diſreſpectful conduct to ſuperior officers, &c. But the generality of ſuch charge, although it may not be abſolutely reprobated by the Military law, or amount to a voidance or annulling of the indictment, affords in every caſe a competent and weighty objection upon the part of the priſoner, which he may urge to the effect of having the charge rendered ſpecial by a pointed detail from the proſecutor of the particular facts on which it is founded: and this requiſition by the priſoner, which is founded in material juſtice, no Court-Martial can legally refuſe. In any caſe, therefore, it is moſt adviſable to prevent all objection by a clear ſpecification of the facts in the charges furniſhed to the priſoner on which he is to be arraigned.

The charges muſt clearly deſign and mark out the perſon of the priſoner, by his name, ſirname, rank, or ſtation, and regiment to which he belongs, &c. as A. B. captain, lieutenant, enſign, ſerjeant, private ſoldier, &c. in the —— regiment, &c.

Specification of time and place.

The ſame minuteneſs and preciſion ought to be obſerved in ſpecifying the *time* and *place* when and where the facts charged were committed, whenever it is poſſible to be thus particular; for ſuch ſpecification may in moſt caſes be eſſentially neceſſary towards the priſoner's defence. One of the moſt complete and concluſive proofs of exculpation is an *alibi*, that is, when convincing evidence is produced to the court that the priſoner was in a different place at the time when the crime is charged to have been committed. As to the circumſtance of *place*, it is in all caſes poſſible for the proſecutor to be moſt pointed and ſpecific; and therefore ſuch ſpecification can never be diſpenſed with in

in the framing of the charge. But with regard to time, there cannot always be the ſame certainty and preciſion. Witneſſes, with no intention to falſify, may, from the lubricity of memory, vary in their teſtimony as to hours, days, time of the day, name of the month, &c. and yet be moſt pointed and accurate as to the acts committed. The proſecutor therefore wanting the ſame abſolute certainty for his information, is allowed ſome latitude with reſpect to time; and provided the charge is in other reſpects ſufficiently preciſe, he may charge the fact or facts to have been committed on ſuch a day of ſuch a month, or on one or other of the days of that month, or of the month immediately preceding, or that immediately following. But as this is an indulgence granted only from neceſſity, ſo in no caſe where it is poſſible for the proſecutor to mark the time with certainty and preciſion, ought he to be allowed ſuch latitude as that above mention-

ed, as it deprives the priſoner of all opportunity of proving an *alibi*.

It is not neceſſary to refer ſpecially to the Articles of War, &c.

Although no crimes or offences are cognizable by a Court-Martial, unleſs what are either ſpecially declared to be ſuch by the Articles of War and Mutiny-act, or fall under the general deſcription of diſorders or neglects to the prejudice of military diſcipline; it is not cuſtomary, nor is it neceſſary, in drawing up the charges againſt an offender, to refer to any particular Article of War, or clauſe of the Mutiny-act, of which he has been guilty of a breach. Such reference can anſwer no good purpoſe, but might often lead to cavilling and captious objection. The ſpecification of the criminal act is ſufficient intimation to the priſoner that his offence is conſidered by the proſecutor to be a breach of the Military law, and it is always competent for him to diſpute its relevancy, and to call upon the proſecutor to

to ſhew in what reſpect it falls under the prohibitions of that law.

A true copy of the charges on which the priſoner is to be tried, muſt be furniſhed to him by the Judge-Advocate, in ſuch time before the meeting of the court, that he may have full opportunity for preparing himſelf for his defence, that is, for collecting ſuch evidence, either oral or written, as may be neceſſary for his exculpation, or for redarguing the proofs of the charges; for the adviſing with his counſel on all points touching the conduct of the trial, objections to the members of the court, competency of the witneſſes, &c.

Copy of the charges muſt be furniſhed to the priſoner.

After the charges have been thus furniſhed to the priſoner, it is not competent for the Judge-Advocate or the proſecutor to make any alteration on them, either in ſubſtance or in form, when they come before the court. If a material alteration occurs to be made before trial, the conſent of the commander in chief, or of the perſon

perſon on whoſe warrant the trial is to proceed, muſt be obtained for that alteration, of which likewiſe the priſoner is entitled to have the moſt timely notice that can be given to him.

SECTION II.

Form of Conſtituting the Court.

Authority under which the court is held.

GENERAL Courts-Martial being aſſembled either by the direct authority of the Sovereign, under the royal ſign-manual, or by warrant of a general officer to whom that ſpecial power has been delegated by the Sovereign; ſuch authority or warrant is directed to the perſon appointed to officiate as preſident of the court, and the day, hour, and place of meeting are therein ſpecified. In warrants under his Majeſty's ſign-manual, the whole members of the court are uſually named, and the warrant is intimated to them by the Judge-Advocate

Advocate or his deputy. In thoſe iſſued by commanders in chief, the intimation to the members is commonly given by the adjutant-general to the commanding officers of thoſe regiments from which they are to be choſen.

All trials before Courts-Martial, like thoſe in the civil courts of judicature, are conducted publicly, and with open doors; and in order that this publicity of trial may in no caſe be attended with tumult, or indecorum of any kind, the court are authoriſed by the Articles of War, to puniſh, at their diſcretion, all riotous or diſorderly proceedings, or menacing words, ſigns, or geſtures, uſed in their preſence.

Priſoner brought into court.

The preſident and the whole members of the court being aſſembled on the day appointed for its meeting, and intimation having been previouſly given for all the neceſſary witneſſes to attend, the priſoner is brought into court, and called to the bar by his name; and although till that period

period he may have been in close imprisonment, and even in irons, he must appear there unfettered, and without bonds of any kind; unless (as the ancient law and custom authorise) when there is danger of escape or rescue *. The president now delivers the warrant for holding the court into the hands of the Judge-Advocate, who reads it aloud, as also his own warrant for attending as prosecutor and recorder of the court. He then calls over the names of the whole members, who are desired to take their places according to their rank in the army, and the dates of their commissions, arranging themselves in that order, alternately on the right and left hand of the president.

Privilege of challenging the members. Grounds of challenge.

The Judge-Advocate then demands of the prisoner, whether he has any objection against, or challenge to make of any of the members present; and if he has, he is required to state his cause of challenge, on which

* Hawkins, Pl. Cor.

which the preſident and members muſt order the court to be cleared, and deliberate on the import and validity of the ſame. In the trial of crimes before the Civil courts, the Law of England allows to the priſoner a right of *peremptory* challenge, that is, of poſitively diſclaiming ſuch and ſuch perſons (to a certain number) to be of the ſpecial jury, without any cauſe or objection ſhewn. In Courts-Martial, however, there is no ſuch liberty allowed: The priſoner muſt aſſign his cauſe of challenge, of the relevancy or validity of which, the members are themſelves the judges *. The moſt valid cauſes of challenge

* Writers on Martial law have differed on this point. Mr Adye, in his treatiſe on Courts-Martial, holds, that the priſoner before a Court-Martial is entitled to the ſame privilege of peremptory challenge, that is, without ſhewing cauſe, as the priſoner before a civil tribunal. But this opinion ſeems to reſt on no foundation of reaſon, or authority from practice. The privilege in Civil courts is limited to the members of the jury, but does not extend to the judges, who are ſworn to adminiſter impartial juſtice. The members of a Court-Martial are not only jurymen,

lenge, are, *ſuſpicion of prejudice or malice*, and *infamous character*. The ſuſpicion of prejudice may be reaſonably inferred againſt a juror, from the circumſtance of near relation to any perſon or party injured by the crime of the priſoner, or having an intereſt in the cauſe, whereby he may be led to wiſh the condemnation of the priſoner. As ſuch cauſes of prejudice are various in their degree, it is in the breaſt of the members, as judges of their validity, to give them what weight they may conceive they are entitled to; nor can any general rule of deciſion be preſcribed.

As

but judges; and they take a ſimilar oath. The peremptory challenge of a number of jurymen can be attended with no inconvenience, becauſe they may be inſtantly replaced by an equal number of others; but this with regard to the members of a Court-Martial would frequently be impoſſible, and thus the ends of juſtice would be entirely defeated. Immemorial uſage has given the one practice a ſolid foundation in the common law of the country; but there is no uſage or practice in favour of the other.

As previouſly to the aſſembling of a general Court-Martial, it ſometimes happens, that a court of enquiry is appointed, for the purpoſe of determining whether there appear ſufficient grounds for bringing the perſon accuſed to trial; and it is allowed to ſuch court of enquiry, to call before them, and examine, all witneſſes, both in ſupport of, and defence againſt the accuſation, and report their opinion of the grounds of charge; it has been queſtioned, whether the members of ſuch court of enquiry are thereby incapacitated from being afterwards appointed to ſit on a Court-Martial for the trial of a priſoner on whoſe cauſe they have already reported their opinion. A court of enquiry bearing a near affinity to a grand jury, and the law being preciſe on that point, that no grand juror who has found a bill of indictment againſt a priſoner, can be a member of the petty jury on the trial of that priſoner, or even on the trial of ano-

ther, wherein the ſame matter is in queſtion *; it ſeems to be thence with much reaſon concluded, that it is ſufficient ground for challenging the member of a general Court-Martial, that he had given his opinion of the cauſe in a previous court of enquiry. For although the members of a court of enquiry do not actually pronounce a ſentence upon the cauſe, having no powers to compel the attendance of witneſſes, nor to examine them upon oath, and in fact only report their opinion, whether there appears ſufficient ground for bringing the accuſed perſon to trial; yet even that opinion is derogatory from abſolute impartiality, a natural bias thence ariſing to ſupport and juſtify it on the final trial.

So jealous is the law of the perfect impartiality of jurors, that it is allowed to be a

* 25th Edw. III. c. 3. 8th Hen. IV. 2. Pl. 4. Coke upon Littleton, 157. 6. It is even held to be law, that if a grand juryman who was one of the indictors in the ſame cauſe, be returned upon the petty jury, and do not challenge himſelf, he ſhall be fined. Hales, Hiſt. Com. L. 2. 309.

a good cauſe of challenge, that the juror has been heard to give his opinion before hand, that the party is guilty, 2. Haw. 418; and a ſimilar ground of challenge againſt the member of a Court-Martial would without doubt be ſuſtained.

Much more would it be a ſufficient ground of challenge againſt the member of a general Court-Martial, in an appeal from the ſentence of a regimental court, that the ſame perſon had been one of the judges in the latter.

Two cauſes of challenge impoſſible to be over-ruled, are, the charge of corruption or bribery, verified by competent proof; and malice or hoſtile enmity, expreſſed by word or deed, againſt the priſoner. Infamous character is likewiſe a moſt relevant ground of challenge; but as this objection admits of no preciſe definition or deſcription, it would be neceſſary, wherever it is moved, that the facts or reaſons on which it is founded ſhould not only be

be ſpecified, but proved. Thus, a juror may be reaſonably challenged, on the head of infamous character, who has been tried and convicted of a crime; but the proof of that fact muſt be produced in court, that is, the record of his conviction.

The privilege of challenging is mutual to the priſoner and to the proſecutor; for there may be ſources of prejudice in favour of the priſoner as well as againſt him, and urgent motives that may ſway to acquit, as well as to condemn.

Members ſworn.

Where the priſoner and proſecutor decline to challenge any of the members, or where the cauſes of challenge have been diſallowed, the Judge-Advocate proceeds to adminiſter, firſt to the preſident alone, and afterwards to the members of court, the oath preſcribed by the Mutiny-act and Articles of War. The oath is taken by each perſon holding his right hand upon the Evangeliſts, repeating the words after the Judge-Advocate, and finally, kiſſing the

the book. After the oath has been adminiſtered to the whole members, the preſident adminiſters to the Judge-Advocate the particular oath of ſecrecy required to be taken by him.

Obſervations on the nature of the oaths.

The oath to be taken by the preſident and members contains a twofold obligation of ſecrecy. 1*ſt*, That the juror ſhall not divulge the ſentence of the court for a limited time, "until it ſhall be approved of by his Majeſty, or by ſome perſon duly authoriſed by him;" and 2*dly*, that he ſhall not, "upon any account, at "any time whatſoever, diſcloſe or diſcover "the vote or opinion of any particular "member of the Court-Martial, unleſs required to give evidence thereof as a witneſs, by a court of juſtice, in a due courſe "of law." Both theſe obligations have their foundation in reaſon and good policy. No ſentence of a Court-Martial is complete or final until it has received his Majeſty's approbation, or that of the commander by

by whoſe warrant the court is aſſembled. Until that period, it is, ſtrictly ſpeaking, no more than an opinion, which is ſubject to alteration and reverſal. In this interval, the communication of that opinion could anſwer no ends of juſtice, but might in many caſes tend to fruſtrate and defeat them. The obligation to perpetual ſecrecy with reſpect to the votes or opinions of the particular members of the court is likewiſe founded on the wiſeſt policy. The members of a Court-Martial cannot boaſt the ſame independence on the Crown, and conſequent immunity from influence, as the judges in the ordinary courts of law. The officers who compoſe a military tribunal, are all neceſſarily dependent for their preferment on the Crown and its miniſters. They are even in ſome degree under the influence of their General in chief: powerful motives of opinion, and which might ſometimes lead aſtray a weaker mind from the direct path of juſtice.

juſtice. This danger therefore is beſt obviated by the confidence and ſecurity which every man poſſeſſes, that his particular opinion is never to be divulged. Another reaſon, of yet a ſtronger nature, is, that the individual members of the court may not be expoſed to the reſentment of parties and their connections, which can hardly fail to be excited by thoſe ſentences which it is often neceſſary for Courts-Martial to pronounce. It may be neceſſary for officers, in the courſe of their duty, daily to aſſociate, and frequently to be ſent on the ſame command or ſervice, with a perſon againſt whom they have given an unfavourable vote or opinion in a Court-Martial. The publicity of theſe votes or opinions would create the moſt dangerous animoſities, equally fatal to the peace and ſecurity of individuals, and prejudicial to the public ſervice.

Oath of the Judge-Advocate.

The oath which is taken by the Judge-Advocate contains no obligation to ſecre-

cy, until the ſentence ſhall have received the approbation of his Majeſty, or that of the commander in chief; becauſe it may be of material importance, that previouſly to that approbation, the opinion of the Judge-Advocate, with regard to the propriety, juſtice, and legality of the ſentence of the court, ſhould be known to that power to which belongs the privilege of ratifying or of ſuſpending, and ordering a reviſal of that judgment. But as the law diſpenſes with this poſitive obligation on the Judge-Advocate only for a particular and neceſſary purpoſe; ſo, in all other reſpects, he will certainly conſider himſelf, though not bound by an oath, yet reſtrained by the equally powerful tie of honour, from an unneceſſary and improper diſcloſure of the opinion or ſentence of the court, which, if allowed, would in fact render uſeleſs the poſitive obligation of the members to ſecrecy. The Judge-Advocate is bound by oath, however, as well as the

the members of the court, to maintain the ſtricteſt ſecrecy with regard to the votes or opinions of individuals, for the ſame reaſons of expediency and good policy.

The oaths are to be adminiſtered once only.

Theſe oaths, which are taken previouſly to the Court-Martial's proceeding to any trial, form in fact the eſſentials by which the court is conſtituted: they therefore create an obligation, which is binding on all the members, until it is finally diſſolved. It is on that account unneceſſary and improper (for all unneceſſary oaths are improper) for the ſame Court-Martial to repeat the ceremony of taking theſe oaths for every new trial. The writers who have maintained this opinion, have grounded it on the words of the charge given by the Judge-Advocate, previous to the oath of the members; "you ſhall well and truly "try and determine according to your evi- "dence in the *matter* now before you:" But in the firſt place, the term *matter* being generic, will apply to every ſubject of cri-

minal proſecution which is to be tried by the court; and ſecondly, this is not the oath which is taken by the members; the words of that oath are entirely general, applying to their duty as judges; with which character they continue inveſted till the whole trials are finiſhed, and the court is diſſolved.—It has been urged in oppoſition to this doctrine, that the privilege of challenging the members of the court being competent to every priſoner, and cuſtom requiring that ſuch challenge ſhould be made before the members are ſworn; if that form were not to be repeated in the commencement of every new trial, none could avail themſelves of the right of challenge, but the firſt who was arraigned. But there is no reaſon of juſtice or of common ſenſe, that ſhould preclude a priſoner from challenging, on ſufficient cauſe, any of the members *after* the court is ſworn; provided he had no opportunity of moving his objection *before* that form was gone through.

through. An objection cannot be ſaid to be waved, which the objector had no power of urging. Nay, let the caſe be figured, that a priſoner had poſitively declined to challenge any of the members of the court, as being ignorant at the time of any competent or juſt objection; in conſequence of which, the whole members are ſolemnly ſworn, and the trial is entered upon; and afterwards a moſt juſt cauſe of challenge comes to the priſoner's knowledge, emerging perhaps from the evidence itſelf; can any doubt be entertained that ſuch challenge would be good to the priſoner? It may in practice be held incompetent to challenge a juryman after he is ſworn; but admitting this to be the practice with reſpect to juries, (for which, however, there appears to be no ſufficient reaſon), the analogy does not hold good between a jury which is choſen anew for every particular trial, and whoſe functions begin and end with that trial, and a Court-Martial, which, where

where many offences are to be tried, is, by the terms of the warrant for its conſtitution, authoriſed "to hear, examine, and "give judgment in all ſuch matters as "ſhall be brought before them."

SECTION III.

Arraignment and Trial of the Priſoner.

Incidents to arraignment.

THE Court being now regularly conſtituted, and every preliminary form gone through, the Judge-Advocate, as proſecutor for the Crown, deſires the priſoner to liſten to the charge or charges exhibited againſt him, which he reads with an audible voice; and then the court aſks the priſoner, "Whether he is guilty or not guilty of the "matter of accuſation?"

Thus arraigned, the priſoner may either, 1*mo*, *ſtand mute*, that is, refuſe to anſwer, or anſwer foreign to the purpoſe; or, 2*do*, *con-*

feſs

ſes the fact of which he is accuſed; or, 3*tio*, plead *not guilty* to the charge.

1*mo*, If the priſoner ſtands mute from obſtinacy and deliberate deſign, or anſwers impertinently and foreign to the purpoſe; the court will, in the firſt place, endeavour with wiſdom and temperance to overcome his obſtinacy, by ſetting before him the dreadful conſequence which awaits him, and which is nothing leſs than immediate conviction and ſentence *. If all endeavour to this purpoſe is unavailing, the court muſt proceed to give judgment, as if the Standing mute.

* By the ancient law of England, the puniſhment of preſſing the priſoner to death under an immenſe weight of iron, (termed *peine forte et dure*), was authoriſed in the caſe of ſtanding mute from obſtinacy, 3d Edw. I. c. 12. And this barbarous puniſhment, though rarely put in execution in theſe latter ages, continued to be authoriſed by law, till it was ſolemnly aboliſhed by ſtatute 12th Geo. III. c. 20. which enacted, that every perſon who being arraigned for felony or piracy, ſhall ſtand mute, or not directly anſwer to the offence, ſhall be convicted of the ſame; and the ſame judgment and execution (with all their conſequences in every reſpect) ſhall be thereupon awarded, as if the perſon had been convicted by verdict, or confeſſion of the crime. *Blackſtone*, b. 4. c. 25.

the priſoner had been regularly convicted on the completeſt evidence.

But a priſoner may ſtand mute from natural impediment, as the want of the faculty of ſpeech. It very rarely happens, however, that perſons labouring under that misfortune, have not the power of expreſſing their meaning by intelligible ſigns, unleſs they want the uſe of reaſon. Where therefore a priſoner is arraigned, who, by ſome ſupervening diſeaſe, has loſt the faculty of ſpeech; (for we can hardly ſuppoſe a perſon dumb from his birth to be in a ſituation that ſubjects him to Military law), it would be neceſſary, in the firſt place, to make him clearly underſtand the full import of the charges on which he is to be tried; and afterwards to obtain from him, by the moſt intelligible ſigns, a clear and unequivocal aſſent to, or denial of the matter of accuſation. If this ſhould be found impracticable, and there ſhould be the ſmalleſt doubt with regard to his meaning

ing and intention, he muſt be preſumed to have pleaded *Not guilty*; and the trial muſt proceed in every reſpect as if he had explicitly done ſo. Indeed, in every caſe where the priſoner cannot expreſs his meaning by words, it is the ſafeſt courſe, and ſurely the moſt humane, to preſume a denial of the charge, and to proceed to trial accordingly. Sir William Blackſtone, however, obſerves *, that it is a point yet undetermined, whether judgment of death can be given againſt ſuch a priſoner who hath never pleaded, and can ſay nothing in arreſt of judgment.

When an interpreter is neceſſary.

A priſoner's ignorance of the language in which he is arraigned, and in which the trial is to be conducted, may bring him into a predicament ſomewhat ſimilar to that of ſtanding mute to the charge. In ſuch caſe, it is neceſſary that a neutral perſon of ability and diſcretion, who is equally ſkilled in both languages, ſhould be

* Blackſtone, b. 4. c. 25.

ſworn, to interpret between the priſoner and the proſecutor and court. This interpreter muſt, in the firſt place, explain to him diſtinctly the import and ſubſtance of the charge, and deliver to the court his anſwer to the accuſation; and during the whole courſe of the trial, he muſt tranſlate, for the benefit of the priſoner, the import of the evidence of each of the witneſſes, and put ſuch queſtions as the priſoner ſhall ſuggeſt, either in the way of croſs examination of the evidence for the proſecution, or directly as exculpatory proof.

Confeſſing the crime.

2*do*, If the priſoner plainly and explicitly confeſſes the crime with which he is charged, nothing remains for the court but to pronounce judgment; but as, in ſuch circumſtances, the awarding of a capital or moſt rigorous ſentence is peculiarly painful, the court, not only for the eaſe of their own minds, but in humanity to the priſoner, who may perhaps be influenced by an illuſive hope of mercy, will not willingly record

record ſuch confeſſion, or preclude the unhappy criminal from ample time and opportunity of retracting it. Indeed, if a criminal court is influenced, as it ever ought to be, by the equitable conſideration of duly proportioning puniſhment to the degrees of offence, reaſon and humanity will plead with equal force in their breaſts for a mitigation of the doom of a penitent and confeſſing offender. The eſſence of a crime is the *animus* or intention with which it is committed, and the malignancy of that *animus* is the meaſure of its atrocity. But moſt aſſuredly the mind of that offender is leſs obſtinately and inveterately malignant, who, under the ſtrong impreſſion and conſciouſneſs of his guilt, explicitly avows it, and throws himſelf upon the mercy of his judges, than of him, who, guilty of the ſame crime, has the hardihood to perſiſt in a denial of his guilt, and boldly to abide the iſſue of a trial.

3*tio*, But the moſt cuſtomary plea of a priſoner, General iſſu Not guilty.

priſoner, and always the moſt deſirable, is the general iſſue, or that of *not guilty* of the charge: And this plea muſt be ſimple, and without qualification or juſtification; that is, an abſolute denial on the part of the priſoner of the crime which is laid to his charge. This cannot be better explained than in the words of Sir William Blackſtone, which, though relating, ſtrictly ſpeaking, to trial before the civil courts of juſtice, are equally applicable to Courts-Martial. "In caſe of an indictment for felony or treaſon, there can be no ſpecial juſtification put in by way of plea. As on an indictment for murder, a man cannot plead that it was in his own defence againſt a robber on the highway, or a burgler; but he muſt plead the general iſſue, not guilty, and give this ſpecial matter in evidence. For, (beſides that theſe pleas do in effect amount to the general iſſue, ſince, if true, the priſoner is moſt clearly not guilty), as the

"facts

" facts in treaſon are ſaid to be done *pro-*
" *ditoriè, et contra ligeantiæ ſuæ debitum*; and
" in felony, that the killing was done *felo-*
" *nicè*; theſe charges, of a traitorous or fe-
" lonious intent, are the points and the
" very *giſt* of the indictment, and muſt be
" anſwered directly by the general nega-
" tive, not guilty; and the jury upon the
" evidence will take notice of any defen-
" ſive matter, and give their verdict ac-
" cordingly, as effectually as if it were or
" could be ſpecially pleaded. So that this
" is, upon all accounts, the moſt advanta-
" geous plea for the priſoner *."

Pleas in bar of trial.

But a priſoner who neither ſtands mute, confeſſes the crime, nor pleads not guilty to the charge, may, immediately upon his arraignment, offer certain pleas in bar of the trial; as, that he has been formerly tried for the ſame individual act or acts of crime; which, if verified by production of the record of his acquittal or conviction, or

* Blackſtone, b. 4. c. 26.

or even by other ſufficient evidence, muſt be effectual to quaſh the trial. It may be eaſily underſtood, however, that the plea of a former acquittal can be of no avail, if the new trial is brought in appeal of the judgment of the court which had pronounced the ſentence of acquittal. A pardon of the crime for which the priſoner is arraigned, is likewiſe a valid plea in bar of the trial. Nor is it to be doubted, that a promiſe or aſſurance of mercy given on the condition of becoming evidence againſt an accomplice, or a criminal, who is tried for the ſame offence, would be admitted by the court as an effectual bar of the trial of the perſon who pleads it, and verifies his plea.

But with reſpect to theſe pleas in bar of trial, it is proper to remark, that although, if admitted, they are concluſive in favour of the priſoner, they are not, if repelled, concluſive againſt the perſon who urges them; that is to ſay, if the court ſhall determine

termine againſt him upon the plea in bar, he ſhall not be thereupon immediately convicted, but ſhall ſtill be at liberty to reſort to the general iſſue, or the plea of not guilty of the charge: "For the law," ſays Blackſtone, "allows many pleas by which "a priſoner may eſcape death, but only "one plea in conſequence of which it can "be inflicted, viz. on the general iſſue, "after an impartial examination and diſ-"cuſſion of the facts *."

A priſoner, moreover, may validly object to the juriſdiction of the court, if it appear that they have no proper authority for taking cognizance of the crime; as if a ſoldier were arraigned before a Court-Martial for a crime cognizable only by the civil courts, or brought before a regimental Court-Martial for a capital offence. It would likewiſe be a valid exception to the juriſdiction, that the court did not conſiſt of the requiſite number of members, or that theſe

Objections to the juriſdiction.

* Book 4. c. 26.

theſe were not of the requiſite rank to ſit upon the trial of the priſoner; as, if a lieutenant or enſign were appointed to ſit on the trial of a field-officer, contrary to the regulation of the Mutiny-act.

Trial. The priſoner having pleaded the general iſſue of not guilty, the proſecutor proceeds to adduce his evidence in ſupport of the charge, by the examination of witneſſes, and the production of ſuch written documents as tend to ſubſtantiate and prove the matters of accuſation; a liſt of the witneſſes having been furniſhed to the priſoner previouſly to the trial, that he may be aware, and have full time to deliberate on any objection that may lie againſt their admiſſibility, or prepare himſelf to encounter their teſtimony by contrary evidence.

If the accuſation reſolves itſelf into a variety of diſtinct articles or charges, the court will allow the priſoner his option whether

whether to urge his defence and examine evidence ſeparately to each article, or to enter upon the general proof of exculpation after the proſecutor has gone through the whole of his evidence in ſupport of the charges. The former mode of procedure ſeems the more eligible where the priſoner is charged with ſeveral diſtinct and ſeparate crimes; as if, for example, the ſame perſon were charged with diſobedience of orders, embezzling of ſtores, and encouraging mutiny: the latter mode ſeems preferable where the charges, though conſiſting of ſeparate acts, either amount to the ſame crime, or are intimately connected together, as falſe muſters or falſe returns, made at different times; various acts of embezzling of pay, of clothing, and of forage, &c.

Examination of the witneſſes.

In order to maintain regularity in the proceedings of the court, the witneſſes in ſupport of the charges are firſt examined by the Judge-Advocate or proſecutor, and

when he has finiſhed his interrogatories, the priſoner is allowed to croſs-queſtion, that is, to put any relevant queſtions that may occur to him, ariſing from and relative to the evidence already given. When the priſoner has finiſhed his croſs-queſtioning, the court put any queſtions that they may think proper, in explanation of what has been already ſworn, or in farther proof of the articles of charge *.

Each witneſs, previouſly to his examination, is ſworn by the Judge-Advocate upon the holy Evangeliſts, to declare the truth, the whole truth, and nothing but the truth, in ſo far as ſhall be aſked of him upon the trial.

The

* It is of importance that this rule, which is common to all criminal courts, ſhould be ſtrictly obſerved. A deviation from it deranges the chain of evidence, and introduces perplexity and confuſion into the record of the proceedings. See Lord Mansfield's juſt obſervation to that purpoſe, on the trial of Lord Biron before the Houſe of Peers, State Trials, vol. x. p. *524.

The Judge-Advocate, who is the recorder of the court, takes down the whole evidence in writing from the mouth of the witneſſes; beginning each teſtimony with the name and deſignation of the witneſs, and noting whether he is an evidence for the proſecutor or the priſoner; as, "A. B. "Lieutenant in the regiment of "infantry, a witneſs for the proſecutor, "ſolemnly ſworn and examined, depoſeth "as follows." The evidence is moſt uſually taken down in the way of queſtion and anſwer, each interrogatory denoting the party who puts it; as, Q. by the proſecutor; Q. by the court; Q. by the priſoner. Sometimes, however, a witneſs gives his teſtimony in the way of narrative; in which manner it muſt likewiſe be taken down in writing, the recorder adhering as nearly as poſſible to the very words of the witneſs.

Evidence muſt be taken down in writing.

No witneſs is permitted to read his evidence to the court; for this might give room

for ſubornation of evidence, againſt which every court is moſt anxious to guard, by the preliminary queſtions, whether the witneſs has been inſtructed what to ſay, or received any reward, or promiſe of reward, for giving his teſtimony. Although, however, the witneſs is not allowed to read his evidence, it is not illegal or improper, in circumſtantial caſes, or in caſes where dates are to be detailed, or matters of account, for the witneſs to make uſe of written notes, for the aid of his memory, and for the greater preciſion of his teſtimony.

Witneſſes muſt be examined apart.

The more effectually to guard the purity of the evidence, thoſe who are cited to appear as witneſſes are not allowed to be preſent in court during the examination of any of the previous witneſſes, as this circumſtance would of itſelf afford a valid objection to their teſtimony, being a ſpecies of ſubornation. It is proper, therefore, that in the commencement of the trial, and indeed in the outſet of every day's proceedings,

proceedings, the Judge-Advocate ſhould give warning to all who are cited as evidences, and who may chance to be preſent, to retire, and not to enter the court till they are officially called upon to be ſworn.

Counſel, if allowed in a Court-Martial.

Courts-Martial being in general compoſed of men of ability and diſcretion, but who, from the nature of their profeſſion and general mode of life, are not to be ſuppoſed verſant in legal ſubtilties, or abſtract and ſophiſtical diſtinctions; and the caſes that come before them giving riſe to few queſtions of law; it has hence been conſidered as founded in eſtabliſhed uſage, that counſel, or profeſſional lawyers, are not allowed to interfere in their proceedings, or, by argument or pleading of any kind, to endeavour to influence either their interlocutory opinions or final judgment. This is a moſt wiſe and important regulation, nor can any thing tend more to ſecure the equity and wiſdom of their deciſions: For lawyers

lawyers being in general as utterly ignorant of Military law and practice, as the members of Courts-Martial are of civil juriſprudence and the forms of the ordinary courts; ſo nothing could reſult from the colliſion of ſuch warring and contradictory judgments, but inextricable embarraſſment, or raſh, ill-founded, and illegal deciſions.

But although it is thus wiſely provided, that profeſſional lawyers ſhall not interfere in the proceedings of Courts-Martial, by pleading or argument of any kind, it is at the ſame time not unuſual for a priſoner to requeſt the court to allow him the aid of counſel to aſſiſt him in his defence, either in the proper conduct of his exculpatory proof, by ſuggeſting fit queſtions to the witneſſes, or in drawing up in writing a connected ſtatement of his defence, and obſervations on the general import of the evidence. This benefit the court will never refuſe to a priſoner; becauſe, in thoſe unhappy circumſtances, the party may either want ability

ability to do juſtice to his own cauſe, or may be deſerted by that preſence of mind which is neceſſary to command and bring into uſe ſuch abilities as he may actually poſſeſs. In this ſituation, however, the priſoner's counſel who properly underſtands his duty, will ſee that it is his part not to embarraſs, to teaſe, or to perplex the court, but rather to conciliate their favour, by wiſely regulating the conduct of his client; not to force the diſcordant and unſuitable axioms and rules of the civil courts upon a military tribunal, but candidly to inſtruct himſelf in that law which regulates their procedure, and accommodate himſelf to their forms and practice.

When the evidence in ſupport of the charges is cloſed, the priſoner ſometimes judges it proper to ſubmit to the court, either verbally, or in writing, a general ſtatement of thoſe defences which he means to ſupport by evidence. He then enters upon his exculpatory proof, by examining ſuch witneſſes

neſſes as he thinks material to redargue the preceding evidence, or to eſtabliſh his general character and good behaviour; or by producing written documents to theſe effects. The examination of the exculpatory witneſſes is conducted in a ſimilar manner to that of the evidence for the proſecution. The priſoner firſt interrogates his own witneſſes, putting his queſtions either himſelf, or by the mouth of the Judge-Advocate. When his interrogatories are ended, the proſecutor is entitled to croſs-queſtion the evidence; and finally, the court put all queſtions to the witneſſes that appear to them proper for bringing out the truth.

When the whole evidence on both ſides is cloſed, the priſoner may, if he thinks proper, demand leave of the court, to ſum up, either verbally, or in a written ſtatement, the general matter of his defence, and to bring into one view the import of the proof of the charges, with ſuch obſervations

ſervations as he conceives are fitted to weaken its force; and the reſult of the evidence in defence, aided by every argument that is capable of giving it weight.

To this ſtatement on the part of the priſoner, the proſecutor has a right to make a reply; and under this privilege he may either recapitulate, methodiſe the import of his evidence, and ſtrengthen it by pertinent argument, or ſhew the weakneſs and inſufficiency of the proof in exculpation: and here, in ſtrict regularity, the trial ends. But if the priſoner ſhall in his defence have impeached the credibility of any of the witneſſes for the proſecution, it is competent for the proſecutor to reeſtabliſh their character by new evidence *; or,

* As this is a point attended with conſiderable difficulty, it may be proper to illuſtrate what is here ſaid, by a remarkable example. On the trial of Lord George Sackville, after the concluſion of the evidence, both for the proſecution and defence, "the Judge-Advocate, as proſecuting in his Majeſty's name, ſtated to the court, that "Lord George Sackville had in his defence impeached

or, if the priſoner in his defence ſhall have introduced any new matter, encountering the

" the credibility of Lieutenant-Colonel Sloper in many " reſpects, and eſpecially by examining ſeveral witneſſes " to prove that his Lordſhip did not appear to them to " be at all alarmed or confuſed during the courſe of the " day; and propoſed, by way of reply, to ſupport the credi- " bility of this witneſs, 1*ſt*, By producing other officers " of the cavalry, then under his Lordſhip's command, to " ſpeak as to their judgment of Lord George Sackville's " appearance at different times on that day; and 2*dly*, " By examining other perſons to corroborate the teſtimony " of this witneſs, by ſhewing that he gave the ſame ac- " count in general, at the time, and within a ſhort time " after, as he had given upon the trial: And in regard " Lord George Sackville had endeavoured to prove, that " he was not where Lieutenant-Colonel Sloper and other " witneſſes for the Crown had ſuppoſed him to be, " and that it was therefore impoſſible for the ſaid Lieu- " tenant-Colonel Sloper to have heard what he has aſ- " ſerted concerning him; the Judge-Advocate propoſed, " 3*dly*, To examine other witneſſes to eſtabliſh the teſti- " mony of the former, by ſhewing that his Lordſhip was " in fact where their evidence had ſuppoſed him to be.— " Lord George Sackville thereupon *objected* to the two " firſt of the ſaid propoſals, urging, amongſt other reaſons " by him offered, that the *veracity* only, and not the *cre-* " *dibility* of the witneſs had been impeached; and there- " fore, that there was no pretence, in reply, to examine " any perſons to eſtabliſh what had not been attacked; " and that examining other perſons as to their opinion of " his

the evidence of the charge, but to which that evidence was not directed, the profecutor

" his appearance, was going into new proof to enforce the " charge, which ought not to be admitted in reply. But " the profecutor ſtill contending for the examination of " theſe witneſſes, and alleging, that the circumſtance of " his Lordſhip's appearance was not relied upon as a " point eſſential to the charge, (which was diſobedience " of orders only), but an incidental matter mentioned by " a witneſs, of which advantage had been taken to inva- " lidate his credit; and that the other matter propoſed, " was to anſwer the general impeachment of the witneſs's " credibility, and eſpecially to ſhew that his teſtimony " was not influenced by the implied cenſure of Prince " Ferdinand's orders, the opinion of the court was de- " ſired thereupon; and the matter having been fully un- " der conſideration, a *queſtion* was put, whether the court " ſhould now admit any new witneſſes to prove, that Lord " George Sackville appeared to them, at different times " in the courſe of the day, to have been alarmed and con- " fuſed, in order to corroborate that part of Lieutenant- " Colonel Sloper's evidence which relates to Lord " George Sackville's appearance? And the court is of " opinion in the *negative*, becauſe that appears to the " court to be a circumſtance which may materially ope- " rate in ſupport of the charge. *Another queſtion* was " then put, whether the court ſhould admit evidence in " confirmation only of Lieutenant-Colonel Sloper's having " declared to the ſame effect, as in his depoſition now be- " fore the court, at the time, or within a ſhort time after- " wards? and the court is of opinion in the *affirmative*,

ſecutor is allowed to examine witneſſes to that new matter: as, for example, a priſoner is charged with an act of mutiny, and the charge is clearly proved; but the priſoner in his defence alleges, and adduces evidence to ſhew, that he was compelled by others to the commiſſion of the act, againſt his own will, and at the hazard of his life. This being new matter, to which the former evidence for the proſecutor

"because the credibility of Lieutenant-Colonel Sloper's "evidence does appear to the court in ſome reſpects "to be impeached by Lord George Sackville." *Trial of Lord George Sackville, &c.*

With reſpect to the above caſe, may it not be queſtioned, whether the diſtinction made by the court in theſe two opinions is not rather ſpecious, and merely verbal, than ſolid or ſubſtantial? For allowing that the credibility of Lieutenant Colonel Sloper was the only point to be eſtabliſhed, the examination of new evidence to the facts ſworn by him, was certainly the moſt effectual mode of eſtabliſhing that credibility, though the neceſſary conſequence of that examination might be to corroborate the charge. The court, therefore, by refuſing to examine new evidence to thoſe facts, did in reality refuſe to allow the beſt means of eſtabliſhing Lieutenant-Colonel Sloper's credibility. On the other hand, by allowing evidence to be examined in proof of

ſecutor does not in the leaſt apply, the proſecutor is allowed to redargue it by the examination of witneſſes, or the production of ſuch documents as he thinks fitted to diſprove it. In ſuch caſes, it is cuſtomary for the court to allow the priſoner the liberty of a rejoinder, or anſwer to the proſecutor's reply; an indulgence to which, in ordinary caſes, he is not entitled.

of Lieutenant-Colonel Sloper's having at the time, and within a ſhort time afterwards, declared to the ſame effect, they in reality allowed what was very ſtrongly to operate in ſupport of the charge, viz. the re-eſtabliſhment of a moſt material witneſs to his entire credibility. In ſhort, no new proof can be in any wiſe material to be brought by a proſecutor, but what muſt in its tendency operate in ſupport of the charge. The only queſtion, therefore, for the court to determine, when the proſecutor demands ſuch evidence, ſeems to be, whether the priſoner has not by the mode of his defence rendered ſuch evidence abſolutely neceſſary? And this it muſt be in every caſe where either the *credibility* or the *veracity* of the witneſs has been impeached, (for the diſtinction has no ſolidity), or where *new* and *relevant matter* has been introduced by the priſoner in his defence.

CHAP.

CHAP. VI.

Of Evidence.

IN the trial of military crimes by Courts-Martial, the rules of evidence, which have their foundation in the principles of juſtice and of reaſon, are the ſame that apply to the trial of crimes before the civil courts. It is therefore of eſſential conſequence, that the general doctrine of the Law of Evidence ſhould be underſtood by all military perſons, who may either be called on to diſcharge the important function of judges in a military tribunal, or to ſuſtain the more painful character of parties in its proceedings.

Definition of Evidence.

Evidence is that which either proves and demonſtrates, or which renders highly probable and worthy of credit to a court or jury, the facts or points in iſſue before them.

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What has no tendency to eſtabliſh the facts or points in iſſue, is therefore no evidence, and ought not to be admitted by a court.

But in circumſtantial and preſumptive evidence, circumſtances which have not an immediate and direct tendency to prove the very facts in iſſue, may have an indirect and conſequential tendency to that effect, and are therefore not to be diſallowed by a court, provided the party who urges them ſhall make their conſequence apparent.

Evidence is of two kinds, viz. 1*ſt*, *Viva voce*, or parole-evidence, given by witneſſes in court; and 2*d*, Written evidence, by records, deeds, and other authentic and probative papers. Of theſe two ſpecies of proof it is neceſſary to treat ſeparately, firſt premiſing certain rules relative to evidence in general.

General rules relative to evidence.

It is a general rule, that, in all caſes, the beſt evidence of which the matter is capable ſhall be reſorted to, provided that evidence

dence can be brought. If that is impoſſible, the court will require the beſt evidence that can be had: "For if it be "plainly ſeen in the nature of the tranſ- "action, that there is ſome more evidence "that doth not appear, the very not pro- "ducing it is a preſumption that it would "have detected ſomething more than ap- "pears already; and therefore the mind "does not acquieſce in any thing lower "than the utmoſt evidence the fact is ca- "pable of." *Baron Gilbert's L. of Evid.*

All evidence for and againſt the facts in iſſue is to be weighed, and judgment given according to that which preponderates. In the balancing of contrary evidence, the mind is to be guided by no other rule than this, That aſſent muſt be given to that teſtimony, of whatever nature it be, which produces the ſtrongeſt belief. Thus, if one ſingle witneſs of ſufficient credibility, who had the beſt opportunity of knowing the truth, ſhall ſwear poſitively to a fact, and his

his teſtimony ſhall be encountered by two other witneſſes, whoſe credibility is more ſuſpicious, or whoſe opportunity of knowledge was not ſo great; the teſtimony of the ſingle witneſs producing ſtronger belief than that of the others, ought to preponderate.

On the ſame principle, a teſtimony which is preciſe and circumſtantial, muſt outweigh that which is leſs particular or minute, and goes only to a general fact; becauſe the former implies more attentive obſervation or more pointed recollection, and therefore creates a ſtronger belief.

From this principle, likewiſe, it follows, that poſitive evidence muſt outweigh that which is negative; for the former being the reſult of attention and obſervation of the facts, can never be encountered or diſproved by that which may have ariſen merely from the want of ſuch attention and obſervation. Thus, ſuppoſing two credible witneſſes ſhall depoſe pointedly to certain

words ſpoken by A, as, that he called B a ſcoundrel; and two or three others of equal credibility ſhall ſwear, that, though high words were uſed, they did not hear that particular expreſſion; the former evidence ought to preponderate over the latter.

The weight of a witneſs's evidence does not altogether depend upon the words which he utters upon oath, but often greatly upon the manner in which his teſtimony has been delivered. Thus the teſtimony of a witneſs who appears evidently to be influenced by his paſſions, in giving his evidence on either ſide of a cauſe, is of much leſs weight when ſwearing to facts which favour that ſide, than the evidence of another who exhibits no ſuch bias; and converſely, the teſtimony of a witneſs ſwearing to facts which make againſt that ſide to which his paſſions evidently incline him, is entitled to the greateſt weight. For this reaſon, the teſtimony of a perſon who voluntarily offers himſelf to be an

evidence

evidence is always ſuſpicious, as arguing a ſtrong bias of paſſion or of intereſt.

Even the countenance, looks, and geſtures of a witneſs, add to, or take away from the weight of his teſtimony. It is therefore neceſſary, that thoſe external criterions of veracity ſhould not only be carefully attended to, but ſhould be guarded pure, and free from every endeavour of parties intereſted to warp, diſguiſe, or ſuppreſs them. Hence all attempts to browbeat, perplex, or irritate a witneſs in the delivery of his teſtimony, are moſt reprehenſible; and a court is not only deficient in a proper feeling of its own dignity, but poſitively in its bounden duty, if it does not repreſs ſuch conduct with exemplary ſeverity. As all attempts of this kind affect the weight of the evidence, they are in fact nearly allied to the puniſhable crime of ſubornation of perjury.

It is an idle queſtion, which has been diſputed by many writers on evidence,

whether the greateſt weight is to be given to *written* teſtimony, or to that which is delivered *viva voce* upon oath by a witneſs? The queſtion admits of no general anſwer; for the ſuperior weight of each mode of proof depends on the nature of the fact or matter at iſſue. Thus, if the point at iſſue were, whether A were a member of a certain corporation, the written records of the corporation would be preferable evidence to the teſtimony of witneſſes ſwearing to his election on ſuch a day, or the contrary. But if the queſtion were, whether A did not ſtab B with a ſword on ſuch a day, and in ſuch a place, the teſtimony of witneſſes preſent at the rencounter, would outweigh any written evidence brought to prove that A was in a different place at the time; as the minutes of a ſociety of which he was a member, the date of a letter from him bearing to be written from another place, &c.: In both theſe caſes the weight is given to that

that ſpecies of teſtimony which is *the leaſt liable to error or corruption.* In many caſes, the evidence is compounded of both ſpecies of proof; and as the one ſometimes encounters the other, it is neceſſary to adopt this principle for determining to which of the two we ought to give the greateſt weight.

Of Viva Voce, *or Parole Evidence.*

Who may be witneſſes.

THE law holds, that all perſons who appear to have ſufficient wiſdom and diſcernment, and who, from their general character, are preſumed to have a proper ſenſe of the ſacred obligation of an oath, are capable of being witneſſes in a court of juſtice. Hence it follows, that where theſe eſſential requiſites are found, and the witneſs underſtands, or can be made to underſtand the ſubject to which his teſtimony is required, and feels his obligation to

to ſpeak the truth, it matters not of what country he is; or what language he ſpeaks, (if his meaning can be conveyed to the court); nor of what age he is; nor of what religion; provided he acknowledge a God, and be willing to bind himſelf by the requiſite ſolemnity of an oath.

Perſons excluded from giving teſtimony.

But the law poſitively excludes certain perſons from giving teſtimony in a court of juſtice; and theſe may be reduced to four claſſes. 1. Thoſe who have an intereſt in the matters at iſſue. 2. Thoſe who ſtand in a certain relation to the parties in the cauſe. 3. Thoſe who have committed crimes which deſtroy their credibility, or who are ſtigmatized by law. 4. Thoſe who want ſufficient diſcernment and underſtanding.

1. Intereſted perſons.

1. Of thoſe diſqualified through intereſt in the cauſe, the chief is the party, either proſecutor or defendant, who cannot be allowed to give evidence *for* himſelf; but he is the beſt witneſs that can be *againſt* himſelf.

himſelf. But this rule is to be underſtood only of thoſe who are to make actual gain, or ſuffer loſs by the iſſue of the ſuit; for in many caſes of a criminal nature, and where the object is not gain, or the avoidance of loſs, but the puniſhment of a crime, the informer and proſecutor is allowed to give evidence againſt the party accuſed; one principal reaſon for ſuch practice being the neceſſity of circumſtances; for otherwiſe, many crimes would eſcape unpuniſhed from the want of evidence. Thus, in civil courts, the party who ſuffers a robbery, a rape, or an aſſault, is allowed to give evidence upon oath againſt the offender; and in trials before Courts-Martial, a private party who is accuſer, and who ſuſtains the character of proſecutor upon the trial jointly with the Judge-Advocate, may offer his own evidence upon oath in ſupport of the charges. The court cannot refuſe ſuch teſtimony; but, as in all caſes the jurors weigh their evidence, they

they will give to it the degree of credit only to which they conceive it is entitled. In all caſes, the proſecutor may be called upon to give evidence *in favour* of the priſoner, or to produce records or papers of any kind which may be neceſſary for the priſoner's defence *. The informer on a penal ſtatute, who, by law, is entitled to a part of the penalty, having a pecuniary intereſt in the ſuit, cannot be allowed to give teſtimony; though to this rule there are ſome exceptions, by particular and expreſs enactment of the ſtatute.

That

* See the Judge-Advocate General's opinion on the trial of the Honourable Lieutenant-General James Murray, Governor of Minorca, which is in ſubſtance, that the accuſer and proſecutor is entitled to give his own evidence in ſupport of any of the charges. And accordingly Sir William Draper, who ſtood in that character upon the trial, gave evidence upon oath, touching one of the charges which accuſed General Murray of perſonal wrong and injuſtice to him (Sir William Draper). So likewiſe, on the trial of the Honourable Major H. F. Stanhope for the ſurrender of Tobago, Governor Ferguſon, who was accuſer and proſecutor, gave his own evidence at great length in ſupport of the charges; and the practice is extremely common.

That is equally an intereſt which exempts from loſs, and which entitles to gain. Thoſe who have given bail cannot therefore be witneſſes for their principal. On the ſame *ratio*, the maſter of a ſhip being proſecuted for running over and ſinking a barge, the evidence of the pilot was rejected, becauſe he was anſwerable, if faulty in ſteering, to the maſter. But the law holds, that the gain or loſs muſt be immediate and certain, and not contingent or barely poſſible. So it has been adjudged that an *heir-apparent* might be a witneſs to prove the titles of lands, but a *remainder-man* could not.

Yet if the gain, though immediate, is ſuch as cannot be ſuppoſed to influence any man of honourable principles to ſwear contrary to the truth, or even to give a biaſſed teſtimony, a court of juſtice will not repudiate his evidence. Thus, the ſteward of a manor was admitted to prove, that, by the cuſtom of the manor, certain fines were

due on the death of the lord to his heir, by the tenants, who were then re-admitted, notwithſtanding it was objected that the ſteward had fees on the re-admiſſion. On the ſame principle, in Courts-Martial, inferior officers who may gain promotion or rank by the conviction of their ſuperiors, are not on that account excluded from giving teſtimony againſt them.

It has been adjudged, that the intereſt which amounts to a diſqualification muſt be the obtaining of ſome actual profit bettering the witneſs's eſtate, or the immediate proſpect of ſuch profit; not the intereſt of eſtabliſhing a higher character, or exculpating himſelf from a charge of miſconduct or neglect *. But this diſtinction has no foundation in reaſon or in good ſenſe; for a man's character and reputation for good conduct is his moſt valuable eſtate; and to protect theſe from injury is his deareſt intereſt; which therefore muſt give the

* Eſpinaſſe on Niſi Prius, p. 707.

the ſtrongeſt bias to his teſtimony in every caſe where theſe are concerned.

The judges of the court and the jurors * may be ſworn as witneſſes for any of the parties; for they can have no intereſt in the iſſue of the trial, and no bias of any kind to give evidence againſt the truth.

A perſon who either receives or has been promiſed a pecuniary reward, or a benefit of any kind whatever, to himſelf, to his family or friends, or who receives or is promiſed the releaſe of any obligation by the party who calls for his teſtimony, is diſqualified on account of his intereſt in the ſuit.

A perſon who has been threatened with vengeance of any kind, or any manner of miſchief to himſelf, if he ſhould refuſe to give evidence in a certain way, is an incompetent witneſs *for* the party who has ſo threatened him. And reaſon urges, that his teſtimony *againſt* that party, though not

* Hawkins's P. C. 432. Bacon's Abr. vol. 2. p. 286.

abſolutely inadmiſſible, is yet very ſuſpicious, from the obvious motive of revenge and malice.

A perſon cited as a witneſs for a defendant is rejected on account of intereſt, if he is either a party in a ſimilar cauſe actually in dependence, or is liable to proſecution on the ſame grounds, or for the ſame offence; for he is evidently prompted by intereſt to ſwear favourably for the defendant, that his acquittal may rule his own caſe.

The neceſſity of circumſtances requires in many caſes, that the evidence of intereſted perſons ſhould be admitted: As, for example, in occult crimes, or where there is a penury of evidence. Thus, as before obſerved, the perſon who is robbed, raviſhed, or aſſaulted and beaten, is not diſqualified from giving evidence; for otherwiſe the criminal might often eſcape detection and puniſhment. But ſuch evidence is always of a ſuſpicious nature, and is not

per

per ſe ſufficient for conviction. On the ſame ground, the teſtimony of an accomplice or *ſocius criminis*, who is pardoned, muſt often be reſorted to for the diſcovery and puniſhment of crimes; but it will in no caſe merit the ſame weight with that of an unprejudiced and impartial witneſs.

In many caſes the diſqualification of intereſted perſons is taken off by ſpecial ſtatute. Thus, in actions brought againſt church-wardens, &c. for embezzlement of the poors-money, the evidence of the pariſhioners is admiſſible by ſtatute. So, by the ſtatutes for apprehending highwaymen and burglars, the perſons ſo doing are legal witneſſes, though they are entitled to a reward; for the neceſſity of circumſtances requires their teſtimony.

For the ſame reaſon of neceſſity, it is adjudged, that where it is apparent that a ſtatute-law could receive no execution, unleſs a party intereſted were to be admitted as a witneſs, there he muſt be allowed;

lowed; for the law muſt not be rendered ineffectual by the impoſſibility of proof*. The ſtatute in this caſe may be ſaid to abrogate the common law for a juſt and neceſſary purpoſe. And in general where that purpoſe is apparent, and the circumſtances of the caſe are ſuch as abſolutely to require the evidence of parties intereſted, for the detection and puniſhment of a crime, there ſuch witneſſes muſt be admitted; the court and jury giving to their teſtimony ſuch credibility as they judge it to deſerve.

It has been already ſaid, that the confeſſion of a party, of the crime for which he is tried, is concluſive evidence againſt himſelf.

2. Perſons related to the parties.

2. Thoſe who ſtand in a certain relation to the parties in the cauſe are diſqualified from giving evidence.

The ſtrongeſt of theſe diſqualifying relations, is that of huſband and wife; for theſe being in the eye of law but one perſon,

* Gilbert's Law of Evidence, edit. 4. p. 128.

ſon, it were the ſame as a party giving evidence in his own cauſe; beſides, they are preſumed to be under the ſtrongeſt bias of affection and influence; and even where that preſumption is manifeſtly excluded, the departure from this rule would lay the foundation of rancour and family diſquiet, and ſo be hoſtile to the ſacred inſtitution of marriage. Huſbands and wives, therefore, can neither be witneſſes *for* nor *againſt* each other in any action.

This rule applies, however, only where one of the married perſons is a *party* in the action: for the wife may lawfully give evidence in a ſuit or trial between other perſons, of which the iſſue may be contingently beneficial or diſadvantageous to her huſband, and *vice verſa* *: though the

* Thus Mrs Perreau, whoſe huſband was under a capital conviction for forgery, being called as a witneſs on the trial of her huſband's brother for the ſame crime, and being aſked, if ſhe did not expect that the conviction of the priſoner would contribute to procure her huſband's pardon? ſhe

the credit of ſuch teſtimony muſt of courſe be ſuſpicious.

The general rule is diſpenſed with in caſes of neceſſity. As where the huſband is proſecuted for a forcible marriage; or where the huſband and wife have cauſe to demand ſureties of the peace againſt each other. And in Lord Audley's caſe, the wife was allowed to give evidence to prove his aſſiſting in a rape upon her. But upon this laſt caſe Ch. Baron Gilbert obſerves, that "this piece of law hath ſince "been exploded, that in a perſonal "wrong done to the wife, the wife may "be an evidence againſt the huſband; "becauſe it may be improved to dreadful "purpoſes, to get rid of huſbands that "prove uneaſy, and muſt be a cauſe of "implacable quarrels, if the huſband "chance to be acquitted *."

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ſhe ſaid, *ſhe hoped it might*. This it was held tended to affect the credit of her teſtimony, but did not render it incompetent.

* Gilbert's Law of Evidence, edit. 4. p. 134.

It has been adjudged in ſome caſes, that a huſband and wife may be witneſſes againſt one another in trials for treaſon; but the contrary has been likewiſe found, and ſeems to be the better judgment *.

It is generally held to be law, that no other relation of kindred but that of huſband and wife is excluded from giving evidence; and therefore, that parents may be witneſſes for and againſt their children, and *vice verſa*; and children of the ſame parents for and againſt each other. But this doctrine is repugnant to the principle and foundation of evidence; for ſuch teſtimony, *per ſe*, is not ſufficient to produce belief or conviction in any matter of doubt, or of material intereſt, there being ſuch ſtrong motives of favour and partiality. If the law, therefore, does not abſolutely reject ſuch teſtimony, the court or jury will receive it under all its circumſtances of ſuſpicion, and give it no more weight than

* Bacon's Abridg. vol. 2. p. 286.

it is entitled to. The Roman law, with more wiſdom than ours, held ſuch evidence altogether inadmiſſible.

Servants. A ſervant in the cauſe of his maſter, though not an inhabile, is yet a ſuſpected evidence.

Counſel and attorneies. Counſel, and attornies or ſolicitors, cannot in any caſe be called upon to give evidence which may diſcloſe the private buſineſs or ſecrets of their clients; but as the evidence of a neceſſary or important witneſs might thus be taken off by giving him a fee, it is now underſtood to be the rule, that a counſel or attorney muſt be aſked the previous queſtion, whether he poſſeſſes the fact of his own knowledge, and previous to his retainer, or has learnt it from his client; and the witneſs will give his anſwer agreeably to that diſtinction. For example, ſuppoſing the queſtion were concerning a razure of a deed or writing of any kind, he may be aſked, whether he ever ſaw ſuch deed or writing

in

in a different plight, for that is a fact which he poſſeſſes of his own knowledge; but he muſt not be examined as to any confeſſions which his client might have made to him reſpecting it*. So he may be examined as to the true time of the execution of a deed, or whether he ſaw a party ſign.

On the ſame principle, counſel and attornies are not obliged to produce papers which may have been delivered to them by their client, as evidence againſt him. Thus an attorney being ſubpœna'd, and called to produce certain vouchers, which were to found a proſecution for forgery againſt his client, was found not obliged to obey the ſubpœna.

But this privilege is ſtrictly confined to attornies or counſel acting in the cauſe, and cannot be extended to others, though profeſſionally and confidentially employed. Nor is it extended to perſons of other pro-

 feſſions,

* Lord Say and Sele's caſe, Mic. 10. Ann.

feſſions, though confidentially truſted by a party in a cauſe.

3. Thoſe who are infamous on account of crimes, or ſtigmatized by law.

3. Thoſe who have committed crimes which deſtroy their credibility are excluded from giving teſtimony in a court, as are alſo certain claſſes of perſons ſtigmatized by law.

The crimes which are held to deſtroy the credit of teſtimony, are felony, and the *crimen falſi*, as perjury and forgery; becauſe theſe crimes deſtroy a man's moral reputation, and are underſtood to be the reſult of ſuch wickedneſs or depravity as would render void the obligation of an oath; and to theſe is added treaſon, on account of the atrocity and danger of the crime, which it is expedient, by every means, to ſtigmatize and render odious. So likewiſe a perſon convicted of a conſpiracy is an inadmiſſible witneſs.

Perſons convicted of felony or of perjury, though pardoned, cannot be received as witneſſes; for the pardon, though it remit

remit their puniſhment, cannot waſh out their moral turpitude. But a perſon convicted of treaſon, and pardoned, may be conſidered as reſtored to his reputation; for his crime is preſumed to have ariſen from an error in judgment, and the receiving of a pardon is held to be a pledge of his future allegiance.

It is the commiſſion of the crime, and not the nature of the puniſhment, nor the ſuffering of that puniſhment, which makes the party infamous. Thus a conviction of barratry, or the ſtirring up of law-ſuits, a crime of a nature equally infamous and pernicious, has been adjudged to render the perpetrator incapable of giving evidence, though the puniſhment was only a fine. Yet it may be queſtioned, whether a puniſhment of a diſgraceful and infamous nature, having an effect of debaſing the character and deſtroying the reputation of the ſufferer, ought not to incapacitate from giving teſtimony; as, for example,

ample, ſtanding in the pillory*, whipping, if inflicted by the ſentence of a civil court, &c. As whipping, however, is a military puniſhment, which is often inflicted for ſmall failures in duty, and is to be looked upon rather in the light of a wholeſome chaſtiſement than an infamous puniſhment, it ought not to render a ſoldier an incompetent evidence; though, according to the nature of the offence for which it has been inflicted, it may affect the credibility of his teſtimony.

A conviction for perjury, even though followed by a pardon, ought for ever to incapacitate the convict from giving evidence, becauſe he has furniſhed demonſtrative proof that he is inſenſible to the ſacred bond of an oath. And therefore it is a moſt abſurd diſtinction, which has been

* Yet even this puniſhment, in general ſo diſgraceful, if inflicted for libellous expreſſions or ſcandalous words ſpoken againſt the Government, ought not, as Chief-Baron Gilbert well obſerves, to be taken as a preſumption againſt a man's common credibility.

been drawn by ſome writers on evidence, and even confirmed by judgments of the courts, that " on perjury at common law, " the party pardoned may be a witneſs, " becauſe the King has the power to take " off every part of the penalty, and ſo diſ- " cern whether it is fit the offender ſhould " be reſtored to credibility; but if a man " be indicted of perjury on the ſtatute, " the King's pardon cannot reſtore his cre- " dibility *." In neither caſe can the King's pardon do any thing more than remit the puniſhment; for the crime muſt adhere indelibly to the character of the offender; and therefore it is to little purpoſe that the law ſhould allow a teſtimony to be given which is incapable of producing belief.

It has been already obſerved, that the teſtimony of an accomplice, or *particeps criminis*, is in many caſes to be received, from the

* Gilbert's Law of Evidence, Eſpinaſſe on Niſi Prius, &c.

the neceſſity of circumſtances; but he is never entitled to the credit of an unſuſpected witneſs.

In all caſes where a party would avail himſelf of the incompetency of a witneſs on account of his conviction of a crime, it is neceſſary that he ſhould produce to the court the record of conviction, or a ſufficient proof of it.

No witneſs is obliged to anſwer any queſtion, the anſwer to which may oblige him to accuſe himſelf of any crime or puniſhable offence. But it has been adjudged, that a witneſs was obliged to anſwer the queſtion, whether he had ever ſtood in the pillory? for the anſwer could not ſubject him to a new puniſhment *.

Infidels, excommunicated perſons, and Quakers.

There are certain claſſes of perſons whom the law ſtigmatizes, and declares incapable of bearing evidence, though not convicted of any crime.

As

* Rex v. Edwards, 4. Term. Rep. 440.

As the ſanction of an oath depends upon the belief of a God, it can have no obligation on thoſe perſons who openly deny the being or attributes of the Deity. Profeſſed Atheiſts from principle, therefore, and thoſe who from ignorance and barbariſm have no impreſſions of religion *, are juſtly declared incapable of giving teſtimony upon oath.

But it is not neceſſary that a witneſs ſhould profeſs the Chriſtian religion. Jews are competent witneſſes, as are Mahometans; the former being ſworn upon the *Old Teſtament*, and the latter upon the *Coran*. So likewiſe perſons of other religions, provided they ſolemnly ſwear by Almighty God, that they will tell the truth, and the whole

* On an indictment for horſe-ſtealing, a witneſs was produced, and being examined, he ſaid, he had heard that there was a God; and believed that thoſe perſons who told lies would come to the gallows; but he acknowledged that he had never learned the Catechiſm, was altogether ignorant of the obligation of an oath, a future ſtate of rewards and puniſhments, the exiſtence of another world, or what became of wicked people after their death. The court rejected him as incompetent. *Leach, Crown Caſ.* 368.

whole truth. There is no particular form eſſential to the oath to be taken by a witneſs. "As the purpoſe of an oath," ſays Lord Mansfield, "is to bind the conſcience, every man, of every religion, "ſhould be bound by that form which "he himſelf thinks will bind his conſcience moſt *." So Gentoos have been ſworn according to the ceremonies of their religion, and admitted as good witneſſes.

It is a remnant of the Popiſh ſuperſtition, that perſons excommunicated cannot be witneſſes; for it was ſuppoſed that thoſe who were excluded out of the church could not be under the influence of any ſentiment of religion; and it being even declared unlawful to converſe with ſuch perſons, they could not receive any queſtions from a court of juſtice †. By ſtat. 3. Jac. c. 5, Popiſh

* Atcheſon v. Everett, Cowp. 382. Hill.

† The grounds of excommunication are hereſy of every ſpecies, ſimony, incontinence, and perjury in eccleſiaſtical courts.

Popiſh recuſants are placed in the ſame condition with perſons excommunicated: And both theſe diſqualifications remain at the preſent day unrepealed exceptions to the competence of teſtimony.

Quakers, whoſe religious tenets debar the taking of an oath, are by ſpecial ſtatute * allowed to give evidence in civil ſuits upon their ſimple affirmation, "I do "ſolemnly, ſincerely, and truly declare "and affirm:" But by a diſtinction for which it is impoſſible to aſſign any reaſon in common ſenſe or expediency †, they cannot be admitted as witneſſes on any affirmation however ſolemn, in any criminal ſuit.

4. Thoſe perſons who want ſufficient diſcernment

4. Perſons who want diſcernment or underſtanding.

* 8th Geo. I. c. 6.

† I am warranted in this aſſertion by a great authority. "If a quaker be indicted of a capital offence, he cannot "now call quakers as witneſſes in his behalf. It is not "poſſible to ſay why the exception was made; yet ſince "made, it muſt be followed." *Lord Mansfield, Atcheſon v. Everett, Cowp.* 384.

diſcernment and underſtanding, are inadmiſſible as witneſſes.

Infants, and children of tender age, are excluded from giving teſtimony, on account of defect of underſtanding; but as the opening and growth of the underſtanding is very various in different individuals, the law has fixed no determined age for their admiſſibility as witneſſes. A child of nine years of age has been allowed to give evidence; but the credit to be given to ſuch teſtimony muſt always reſt with the court and jurors.

Idiots and inſane perſons are utterly incapable of giving evidence; though lunatics, and thoſe ſubject to temporary fits of inſanity, may be received in their lucid intervals. Mere weakneſs of underſtanding does not render a witneſs incompetent, though it may diſcredit his evidence. Perſons deaf and dumb from their birth may be admitted as witneſſes; provided they are capable of diſtinct information by

by means of arbitrary ſigns, and are able, either by writing or by ſigns, clearly and unequivocally to expreſs their knowledge of facts, or make their teſtimony plainly intelligible to a court; and provided likewiſe they can give clear intimation that they underſtand the moral and religious nature of an oath.

Of Written Evidence.

Written Evidence is of two kinds; public and private. Public is, 1*ſt*, Records or memorials of the legiſlature and of the King's courts of juſtice; and 2*d*, Public matters of inferior nature. Records are either acts of parliament, or authenticated proceedings of the courts of record; all of which it is evident muſt give the greateſt faith, and be received as complete proof, in any court, of the facts or matters which they contain. But as the original records themſelves

Public written Evidence.

themſelves cannot be transferred from place to place for private purpoſes, authenticated copies of theſe records muſt be allowed in evidence. Thus the printed ſtatute-book is held to be an authenticated copy of all public or general acts of the Legiſlature, and muſt be received as good evidence; but private acts are not to be received on the evidence of the ſtatute-book: they muſt be compared with the record. A copy of a copy is no evidence at all. The proceedings of courts of records, which are admitted as good evidence, are, judgments of thoſe courts, and verdicts of juries, authenticated either under the proper ſeal, or ſworn copies, that is, ſuch as the producer ſwears he examined with the original, as the copy of a judgment from Scotland or Ireland, produced in a court in England. Such records are evidences of the higheſt nature, and are concluſive proof of the matters which they contain.

Public

Public matters of inferior nature, which are not recorded, but which are admitted as written evidence in courts of juſtice, are, bills and anſwers in chancery; depoſitions, or teſtimonies given in writing, where the witneſs who made them is dead, or cannot be procured; for if he is alive, and can be produced to the court, ſo as to be croſs-examined, the depoſition muſt be rejected, as not being the beſt evidence that can be had. The rolls of a court-baron or manor-court are good evidence relative to property and perſons within the manor. The regiſter of baptiſms, marriages, and burials, or an authenticated copy from it, is good evidence; and in general it is held that all books of that public nature are ſufficient evidence of the matters of which they are the proper regiſters. The regiſter of the Navy-office, with proof of the method there uſed, of returning all perſons dead with the mark D. D. was found to be good evidence

evidence of a perſon's death *. Depoſitions given by a witneſs on a former trial, cannot be received as evidence on another trial, unleſs the witneſs has died in the interim. But depoſitions given upon a former trial, or before a magiſtrate, may be read at a trial, in order to take off the credit of the witneſs, by ſhowing a variation in his teſtimony. The examination of an informer, taken upon oath, and ſubſcribed by him before a magiſtrate, cannot be received as evidence on the trial, unleſs it be proved on oath that the informer is dead, or is unable through ſickneſs to attend the court, or is kept away by procurement of the priſoner. It is not ſufficient to prove that the proſecutors have uſed their utmoſt endeavours to find him, without effect.

Private written Evidence.

Private written evidence may be, books of accounts, either of parties or of third perſons, receipts, diſcharges, bills of parcels,

* Bull. N. P. 249.

cels, gazettes, or newſpapers, notes of hand, and bills of exchange, letters of correſpondence, &c. The preſumption of the veracity of a merchant's books ariſes from their regularity. If that, therefore, be wanting, they ought to give no faith in judgment. At beſt, however, they are incomplete evidence, *per ſe*, in favour of the merchant or the perſon who keeps them; but they are good evidence againſt him. Letters of correſpondence, and all ſimilar writings, muſt be authenticated, that is, proved upon oath to be written by the perſon of whoſe writing they are alleged to be. The compariſon of hand-writings, though it may be uſefully employed for the detection of forgery, is no evidence to authenticate any writing whatever as a piece of teſtimony. It may, however, furniſh a preſumption which will weigh in the ſcale with other evidence.

Of Probability, and the weighing of Evidence.

A thing is probable in proportion as it agrees with what uſually happens in ſimilar circumſtances. It is natural that the mind ſhould more eaſily give its faith to things which are probable from moſt uſually happening, than to matters that are repugnant to that probability; and therefore in judicial proceedings a much ſmaller degree of evidence ought to be held ſufficient to eſtabliſh the truth of the former, than is required to prove the latter. A ſingle witneſs may be ſufficient evidence of a probable fact, whereas it may require the concurring teſtimony of many to prove what is not likely to have happened in ſuch and ſuch circumſtances. In criminal matters, it is often difficult to ſay whether the *probability* is for guilt or innocence; but the law with great humanity holds, that the *preſumption* ſhould always be in favour of innocence,

innocence, and that no perſon ſhould be convicted of a crime unleſs upon the ſtrongeſt and moſt ſatisfying evidence. Poſitive proof therefore is always to be required where it can poſſibly be had; as the teſtimony of two or more impartial witneſſes ſwearing directly to the facts. Where a proof of this kind is wanting, circumſtantial and preſumptive evidence muſt be reſorted to, that is, a proof of a number of concurring circumſtances, which uſually attend certain facts, and which may furniſh ſuch ſtrong motives of belief of the facts themſelves, as nothing but a poſitive proof to the contrary can deſtroy. As if A and B, two perſons who were known to be at mortal enmity with each other, or between whom it was known that a challenge had paſſed, ſhould be obſerved to walk out together to a private place, armed with ſwords, and be ſeen by a paſſenger engaged in actual combat, and A ſhould be found dead, and B ſeen coming

from the place with his ſword bloody, or marks of blood upon his clothes. Theſe are violent preſumptions, and create a belief which nothing but poſitive proof could deſtroy; as for example, the confeſſion of C, that he had interfered between the parties when fighting, and in order to ſave the life of his friend B, had himſelf put A to death.

The credibility of a witneſs, is what alone gives weight to his evidence, and in judging of this credibility, many conſiderations muſt enter into the account; as, condition and rank in life, general reputation, known principles, judgment and good ſenſe, accuracy of memory, perfect indifference to the matters in iſſue, and freedom from prejudice and partiality.

An unwilling and reluctant witneſs, who ſpeaks with caution, anſwering nothing but what is forced out of him by repeated and circuitous interrogation, is unworthy of the ſame credit that is given to one who openly

openly and fairly declares all that he knows upon the point. On the other hand, a witneſs who amplifies in his teſtimony, unneceſſarily enlarging upon circumſtances unfavourable to a party, who ſeems to be gratified by the opportunity of furniſhing condemnatory evidence, or manifeſtly betrays paſſion and prejudice in the ſubſtance of his teſtimony, or in the manner of delivering it, is to be liſtened to with equal ſuſpicion of his veracity.

If a witneſs takes upon him to remember with the greateſt minuteneſs, all the circumſtances of tranſactions long ſince paſſed, and which are of a frivolous nature, and not likely to dwell in the memory, his teſtimony is thereby rendered very ſuſpicious; as, on the other hand, a witneſs affirming his total want of recollection of the moſt material and ſtriking circumſtances of a recent and remarkable fact, which happened in his own preſence, is deſerving of very little credit in

thoſe

thoſe particulars which he pretends to remember.

In all ſuch caſes, however, the diſcerning mind of a juror will be at no loſs to ſeparate the truth of an evidence from its falſehood; and where the former reluctantly breaks forth, he will give it the greater credit, as being the teſtimony of conſcience, not only uninfluenced by the paſſions, but directly againſt their perverting influence.

A ſingle witneſs requires much corroboration from concurring circumſtances; for where there is no preſumption from circumſtances fortifying his evidence, the credit of that perſon would need to be very high indeed, whoſe ſingle and unſupported teſtimony ſhould give faith to any criminal accuſation.

Witneſſes ought always to ſhew the cauſes of their knowledge, for the weight of the teſtimony muſt be in proportion to the opportunity which the witneſs had of knowing

knowing the facts. If, therefore, a man cannot ſet forth a probable cauſe of knowledge, he is not to be believed at all.

A ſingle witneſs, &c.

The atteſtation of a witneſs muſt be only to what he actually knows from his own obſervation of the facts in iſſue. He is not to be examined as to what he has heard, or been informed by others; for his teſtimony being in that caſe a reference to the information of another who is not upon oath, is no evidence at all. Yet a witneſs may ſwear to a report, or that ſo and ſo other perſons have ſaid, (for it may be material to prove that there was ſuch a report), though he can give no evidence to the truth of the matters reported. So likewiſe, though hearſay is no direct evidence of the truth of the things ſaid or related, yet it may be brought collaterally in ſupport of a witneſs's teſtimony; as if a perſon ſhould ſwear that he heard the witneſs frequently tell the ſtory which he has now given upon oath, to various

rious perſons at the time, and with the ſame circumſtances; or it may be brought to diſcredit that teſtimony, by proving that the witneſs ſaid directly otherwiſe to many perſons at the time.

Queſtions of opinion.

In general, facts are the only ſubject of evidence, and not opinions; for it is perhaps only of matters of fact that there can be abſolute certainty or truth: Facts are poſitive, determinate and immutable; but opinions are not only various, but mutable. It is therefore only to the truth of *facts* that evidence is regularly brought; and to form *opinions* on theſe, is the province, not of the witneſs, but of the judge or juror who is to decide upon them. No party in a trial is therefore entitled to obtrude the opinions of a witneſs upon the court or jury, or to call upon a witneſs to anſwer queſtions of opinion. Yet there are caſes in which a juror may deſire the opinion of a witneſs on certain points, in order to regulate his own final judgment or verdict; and the

the court, if it ſees the propriety of that deſire, will call upon the witneſs to give his opinion. This has frequently occurred upon Courts-Martial *; and there are indeed

* On the trial of Lord George Sackville, where the charge againſt the priſoner was general, viz. the diſobedience of orders given by the Commander in chief relative to the troops under the priſoner's command in the battle of Minden, which diſobedience was to be inferred from the mode of executing a variety of operations "in marching, "counter-marching, and attacking the enemy," it is evident that the witneſſes called to give evidence with reſpect to thoſe operations, muſt, in many caſes, have been required to give their own opinions as to their complete or imperfect execution. Accordingly, many queſtions of opinion were put and anſwered upon that trial; and the court came to a general reſolution upon the propriety and admiſſibility of ſuch queſtions as follows: The queſtion being put to Captain Smith, Whether he thinks the early repeated orders of Prince Ferdinand to ſupport the infantry were fully executed by the cavalry then forming themſelves in one line behind this body of infantry? A. "That can only be a mat-"ter of opinion of his: He is willing to anſwer any queſtion "in the world to a point of fact; he wiſhes he was more able "to deliver himſelf ſo that the court might be able to form "any opinion they would wiſh." The witneſs, upon the queſtion being again propoſed, excuſing himſelf for the reaſon above alleged, and the court being thereupon deſired by Lord G. S. to decide how far a witneſs ſhould be allowed to ſpeak to matters of opinion, took the ſame into conſideration,

deed certain articles of the Military law, upon which if a perſon is tried, there is a ſtrict propriety, and even neceſſity, for the witneſſes anſwering queſtions of opinion: As, for example, if an officer is arraigned under that article of war which puniſhes with diſcharge from the ſervice all ſuch ſcandalous or infamous behaviour as is unbecoming the character of an officer and a gentleman,

ration, and came to the following reſolution. "The court has conſidered the matter upon which a doubt was ſuggeſted, and is clearly of opinion, that it is not only regular, but in many caſes neceſſary, to aſk the opinion of a witneſs as collected from the circumſtances which appear to him at the time; but under what circumſtances they will require an anſwer from a witneſs, will always be in the diſcretion of the court; and in the preſent caſe the queſtion is not inſiſted upon." Queſtions of opinion were on ſimilar grounds allowed to be put to the witneſſes on the trial of the Honourable Colonel Stanhope for the ſurrender of Tobago; and on many other trials by Courts-Martial. In the trial of Lieutenant-Colonel Cockburn for the ſurrender of St. Euſtatius, the proſecutor, Lieutenant Rogerſon, put the following queſtion to one of the witneſſes, "As an officer of experience, did Colonel Cockburn, in your opinion, ſhamefully abandon and give up the garriſon, poſts, and troops that were under his command?" This queſtion, of which the tendency was to make the witneſs give his judgment of the whole matter of the charge, was not allowed by the court to be anſwered.

man, it is obvious, that it may be in ſuch a caſe abſolutely neceſſary to make a witneſs declare his opinion of the priſoner's conduct. So likewiſe, if an officer is accuſed of behaving with contempt or diſreſpect to his General, of being found drunk on duty, of quitting his diviſion or poſt without neceſſity, &c. all theſe are caſes in which opinion is ſo combined with fact, that it is either impoſſible that they ſhould be ſeparated in a witneſs's teſtimony, or unfit that they ſhould be ſo: but, as already ſaid, the court is, in all queſtions of this nature, to determine as to the propriety of queſtions of opinion being put and anſwered. With regard to queſtions of doubtful propriety, the beſt rule that can be followed is, That every thing which, on the part of the proſecutor, tends to ſupport or give credibility to the charges, is admiſſible evidence; as is likewiſe, on the part of the priſoner, every thing that has a tendency to invalidate or diſcredit them;

though in both caſes the tendency in either way ſhould be but remote.

It frequently happens, that the tendency of a queſtion put to a witneſs may be to the prejudice of a third perſon who is no party to the trial. This conſequence ought in juſtice and humanity to be avoided wherever it is poſſible; and in no caſe ought the *proſecutor* to be allowed this liberty of indirectly impeaching or affecting the characters of third parties; becauſe it cannot be neceſſary to his purpoſe; but it may ſometimes happen that the *party accuſed* may find it abſolutely neceſſary, in defence of himſelf, to throw blame, and even criminality, on others who are no parties to the trial: nor can a priſoner be refuſed that liberty, which is eſſential to his own juſtification. It is ſufficient for the party aggrieved, that the law can furniſh ample redreſs againſt all calumnious or unjuſt accuſations.

Witneſſes

Witneſſes may be called to ſupport the credibility of witneſſes, either by giving teſtimony to their general good character, or to their knowledge or acquaintance with the facts in iſſue, or to their having invariably related facts in the ſame manner.

If, therefore, the credibility of any of the witneſſes, either for the proſecutor or priſoner, is impeached by the oppoſite party, it becomes proper to re-eſtabliſh their credibility by examining new evidence thereto *.

How Witneſſes are to be brought, and to give their Evidence.

All military perſons are bound by their duty to attend and furniſh teſtimony in all military courts, whenever required ſo to do by a proper authority. This authority is contained in the warrant for aſſembling the

* See ſupra, p. 257.

the Court-Martial; and in conſequence thereof, the proſecutor and priſoner muſt reſpectively ſummon or give warning to thoſe perſons who are neceſſary evidence, of the time and place of the meeting of the court, and make requiſition of their compearance to give teſtimony.

If the witneſſes ſhould be perſons in a civil capacity, who are not ſubject to military authority, nor bound to obey its citations, it is cuſtomary for the party who requires their evidence, to reſort to the aid of the civil power, through the medium of the Judge-Advocate, who, upon applying to the proper magiſtrate, and ſetting forth the neceſſity of the caſe, obtains a *ſubpæna* or ſummons, compelling the attendance of the neceſſary witneſſes, under the uſual penalty.

In general, military perſons are not allowed any ſum, in name of charges or expences, for their attendance upon a Court-Martial; becauſe ſuch ſervice is held to be

be a part of their profeſſional duty. Yet, as it is reaſonable and juſt, that any extraordinary charges which a witneſs may have been put to in the performance of his duty, ſhould be conſidered and defrayed; as if a ſubaltern officer ſhould be obliged to leave his quarters, and travel to a great diſtance, and in the middle of winter, which of neceſſity would occaſion much extraordinary expence; ſo it is not unuſual to allow the reimburſement of ſuch charges in the general expenditure on account of the Court-Martial. But witneſſes in a civil line of life are by law entitled to all their reaſonable charges actually expended, and even to a recompence for the ceſſation of their uſual gains.

All witneſſes muſt be regularly ſworn in preſence of the court and of the parties, and give their teſtimony likewiſe in preſence. In Courts-Martial, the teſtimony of the witneſs is to be taken down in writing, as nearly as poſſible in his own words,

words, and read to him for his approval or correction, after his depoſition is cloſed *.

Although a Peer ſitting in judgment on trials in the Houſe of Peers does not give his verdict upon oath, yet, if called on as a witneſs in a court of law, he muſt be ſworn in the ordinary form.

All objections to the competency of a witneſs muſt be ſtated in open court; but as a Court-Martial never deliberates with open doors, the court muſt be cleared in order to weigh the import of the objection; and when the court have come to a reſolution, it is afterwards communicated in open court to all parties.

A

* It has been ſometimes cuſtomary in Courts-Martial, when a material witneſs has been confined by ſickneſs, to ſend a deputation of certain members of the court, to examine and take down his depoſition in writing; but the practice is moſt erroneous, and has been deſervedly reprobated wherever it occurred, by his Majeſty's entire diſapprobation of the proceedings, on account of ſuch irregularity. In an emergency of this kind, there ſeems to be no other ſafe reſource, than for the whole court and parties to adjourn to the houſe and bed-chamber of the ſick perſon, and there take down his evidence in the uſual form.

A witneſs in a general Court-Martial gives his teſtimony, (as in every other court which is competent to examine evidence upon oath), under certification of incurring the penalty of perjury, if he wilfully falſifies or departs from the truth in any matter eſſential to the iſſue of the cauſe. " Perjury," ſays Chief-Baron Gilbert, " may be puniſhed at common law in any " court that hath authority to examine " the cauſe in relation to which the per- " jury is committed; for it were prepoſ- " terous that they ſhould give a court au- " thority to examine upon oath, and not " to puniſh the violation of that oath." If therefore a wilful perjury is committed in his teſtimony, by a perſon ſubject to the military law, there is no doubt that a Court-Martial, by their own power, can immediately inflict ſuch diſcretionary puniſhment on the offender as they may judge ſuitable to the offence. If the perjury is committed by a perſon not under military Perjury.

authority, but who is brought to give evidence in a Court-Martial, the court will direct either the party injured or the Judge-Advocate, as public proſecutor, to indict the offender before the Civil court; and in ſuch caſe, the ſtatute 23d Geo. II. c. 11. enacts, that in the indictment it ſhall be ſufficient to ſet forth the ſubſtance of the offence, and before what court or perſon the oath was taken, (averring ſuch court or perſon to have a competent authority to adminiſter the ſame), together with the proper averments to falſify the matter wherein the perjury is aſſigned, without ſetting forth any part of the record or proceedings.

Subornation of Perjury.

Subornation of perjury, or the procuring of witneſſes to ſwear falſely, ſtands on the ſame footing with perjury.

CHAP.

CHAP. VII.

Of the Judgment and Sentence of a Court-Martial.

THE laſt ſtage of the trial before a Court-Martial, is the exerciſe by the court of its judicative function, in the return of a ſolemn verdict on the guilt or innocence of the priſoner, and pronouncing ſentence; and this is to be done with ſhut doors, after the parties, and all indifferent perſons, have been ordered to withdraw.

The proceedings muſt be read over to the court.

As the court is now in poſſeſſion of the whole evidence, which has been carefully reduced into writing by the Judge-Advocate as recorder of the court, together with all arguments upon the evidence, both on the part of the proſecutor and priſoner, it is cuſtomary, before proceed-

ing to deliberate upon the judgment, that the court ſhould hear the proceedings read over by the Judge-Advocate, which anſwers the double purpoſe of bringing the whole body of the evidence, in one connected view, to the recollection of the members, and aſcertaining the accuracy and fidelity of the record, by comparing it with the notes taken by individual members in the courſe of the trial.

In complicated caſes, in circumſtantial proofs, in caſes where the evidence is contradictory, or in trials where a number of priſoners are jointly arraigned, as on charges of mutiny or the like, it is expedient that the Judge-Advocate ſhould arrange and methodize the body of the evidence, applying it diſtinctly to the facts of the charge, and bringing home to each priſoner, where there are more than one, the reſult of the proof againſt him, balanced with the evidence of exculpation or alleviation. In ordinary caſes, a charge of this kind

kind from the Judge-Advocate is not ſo neceſſary.

Deliberation and judgment of the court.

Where there are diſtinct and ſeparate charges, or articles of accuſation, the preſident and members of the court reaſon and deliberate ſeparately on each charge; candidly diſcuſſing, in a free and open converſation, the import of the evidence, and allowing its full weight to every argument or preſumption in favour of the priſoner; and being thus ripe for deciſion, the Judge-Advocate puts the queſtion of, Guilty or not guilty of the charge, to each of the members, beginning with the youngeſt *, and ſo progreſſively up to the preſident, and writing down from the mouth of each perſon, his vote or opinion, for acquittal or conviction. The votes are then counted, and if the majority declare the priſoner not guilty, he is accordingly acquitted. If, on the other hand, the majority declare the priſoner guilty, the court proceeds

* Articles of War, § 16. art. 7.

proceeds next to determine what punishment ſhall be awarded, and to pronounce their ſentence for its infliction. The opinions or votes of the members are taken on this laſt queſtion in the ſame manner as on the former; nor are thoſe members who have in the previous queſtion voted for acquittal, to be debarred from voting on the ſecond, which is to decide the degree or nature of the puniſhment; for it would be moſt unjuſt, that thoſe who thought ſo favourably of the priſoner's caſe, as to vote for abſolute acquittal, ſhould from that circumſtance be precluded from rendering his puniſhment as mild as poſſible *.

The

* It is not a little ſurpriſing, that the contrary opinion ſhould however have been laid down even by judicious writers. Mr Adye, (and after him Mr Sullivan), ſays in expreſs words, "If it appears on the caſting up of the votes, that "the majority declare the priſoner guilty, thoſe who have "found him ſo, (for it cannot be ſuppoſed that thoſe who "have found him not guilty would aſſign him a puniſh-"ment), are to paſs ſentence or judgment on him."

Let

Military punishments. Death.

The punishments which it is in the power of a Court-Martial to inflict, are various in their nature and degree, from the highest, which is Death, down to those of the lightest nature, as a short confinement for a private soldier, or a reprimand for a commissioned officer.

It

Let us for a moment attend to the consequence of this doctrine. Suppose a general Court-Martial to consist of sixteen persons, seven of whom vote for the absolute acquittal of the prisoner, and nine declare him guilty. The question remains, what shall be the punishment? And in this question, according to those writers, the seven who voted for acquittal have no vote; of the nine members who vote in the question of punishment, five vote for cashiering, the other four for a temporary suspension or a reprimand. The prisoner, if condemned by these five voices, must suffer the highest punishment next to death, while eleven of his judges think so favourably of his case, that the greater part of that number are for his absolute acquittal, and the rest for the lightest possible punishment. Can it be doubted, that had those members who voted for acquittal, known that this was to be the consequence of their vote of mercy, they would not all have rather adjudged him guilty, in order to reserve their power of mitigating his punishment? On these principles of common sense, we must reprobate the doctrine of the above-mentioned writers, as equally contrary to reason and to material justice.

It is humanely provided by the mutiny-act, that no ſentence of death ſhall be pronounced againſt any offender unleſs nine of the members where the court conſiſts of thirteen, or two thirds where the number of the members is greater, ſhall concur in that ſentence. In ſome particular caſes, the Articles of War point out the expreſs puniſhment to be awarded in conſequence of certain acts; as thus: "Every officer who ſhall be convicted be-" fore a general Court-Martial, of having " ſigned a falſe certificate relating to the " abſence of either officer, non-commiſ-" ſioned officer, or private ſoldier, ſhall be " caſhiered." Art. of War, ſect. 11. art. 10. So likewiſe in the caſe of an officer knowingly receiving a deſerter from another corps, without confining him and giving notice to the regiment to which he formerly belonged, ſect. 6. art. 2. In ſuch caſes the court has no diſcretionary power, but muſt pronounce the ſentence which

which law requires, wherever the fact is proved. There are but two inſtances in which a capital ſentence is decreed by the Articles of War, without a diſcretionary power to the court of commuting the puniſhment. The one is contained in the 12th article of the 14th ſection. "Whoſoever of "our forces employed in foreign parts ſhall "force a ſafeguard, and ſhall be convicted "thereof by a general Court-Martial, ſhall "ſuffer death." The other is in the caſe of a deſerter returning without leave from tranſportation. In all other caſes of the higheſt criminality, as, committing mutiny, ſtriking a ſuperior officer, giving intelligence to the enemy, &c. as the offences admit of greater and leſs degrees of criminality, according to the circumſtances that attend them, ſo the Articles of War allow a diſcretionary power; decreeing "death, or ſuch other puniſhment as by a "general Court-Martial ſhall be awarded." In crimes of a leſs atrocious nature, the

Articles of War declare ſimply, that the offender ſhall be puniſhed at the diſcretion of a general Court-Martial; omitting the word *Death*, which evidently implies, that the power of puniſhing capitally is excluded in ſuch caſes.

Caſhiering. The inferior puniſhments are various, according to the degree of the crimes, and the rank of the perſons who commit them. Of thoſe peculiar to the rank of commiſſioned officers, the moſt ſevere of the inferior puniſhments is caſhiering, that is, depriving an officer of his commiſſion, breaking him, by taking from him the honourable character of a ſoldier, and reducing him to the ſtation of a private citizen. This is ſometimes done *ſimpliciter*, that is, without carrying in the ſentence any judgment againſt the offender of incapacity to be reſtored afterwards to his military character; or with the addition of a judgment of the court, declaring the offender unworthy or unfit to ſerve his Majeſty in any military capacity;

capacity; which is the higheſt of the ſubordinate puniſhments that can be inflicted on a commiſſioned officer.

2. Suſpenſion from rank and pay, which deprives an officer of his military character, and ſuſpends his functions and emoluments for a definite period of time, viz. a year, ſix months, or three months from the date of the ſentence, according to the meaſure of the offence. Suſpenſion.

3. Reprimand, public or private. A public reprimand is inflicted by a commanding officer at the head of the regiment or corps to which the party belongs, and who are drawn out upon parade for the occaſion. Its terms are not preſcribed by the ſentence, but are in the diſcretion of the Commander in Chief, by whoſe authority the ſentence is put in execution, and they muſt be regulated according to circumſtances. A private reprimand is given by the commanding officer, to the party, without the preſence of witneſſes. Reprimand.

Corporal punishments. Degradation.

The inferior punishments peculiar to the state of non-commissioned officers and soldiers, are corporal punishments; as whipping, imprisonment, &c. In cases of desertion, the mutiny-act declares, (sect. 4.) that when a Court-Martial shall not think the offence deserving of capital punishment, they may adjudge the offender to serve in any of the corps stationed in any of his Majesty's dominions beyond seas, for life, or for a certain term of years; with certification, that if the offender shall return into Britain or Ireland without leave, before the term is expired, he shall, on conviction thereof before a Court-Martial, suffer death. Moreover, the Articles of War specially enact for certain offences the degrading of non-commissioned officers to the rank of private soldiers; as for the crimes of a serjeant or corporal selling ammunition, embezzling money, &c. This power of degrading a non-commissioned officer

to

to the rank of a private centinel, reſides at all times in the commanding officer or colonel of the regiment, and can be exerciſed by his own authority, on ſufficient cauſe, without the intervention of a Court-Martial: a diſcretionary power which has furniſhed much topic of diſcuſſion, and frequent occaſion of blame, but which is founded in a juſt and neceſſary policy *; and

* In the debate in the Houſe of Commons on the Mutiny Bill in 1750, a motion was made for an alteration of the clauſe in ſect. 16. art. 14. of the Articles of War, by which non-commiſſioned officers may be reduced to private centinels by order of the Colonel of the regiment. Much complaint was made of this, as a dangerous innovation, as an infringement of liberty, as ſubjecting a moſt uſeful and reſpectable claſs of ſoldiers to the arbitrary will and pleaſure of a commanding officer, and of the great abuſes to which this power might give riſe. In anſwer, it was moſt juſtly obſerved, that this power, though termed an innovation, and though in reality not ſpecially recognized by any Article of War till 1747, was in practice coeval with the army, and abſolutely eſſential to its proper diſcipline; nor could a ſingle example be ſpecified, in which it had ever been abuſed or improperly exerciſed. The function of a non-commiſſioned officer is both conferred and held at the pleaſure of his Colonel or commander. It is a rank which the party owes to his merits, and which therefore ſhould be revocable

and has never in practice been attended with improper conſequences. In

vocable by the ſame power or authority, on a ceſſation of the cauſe for which it was beſtowed. In advancing a common ſoldier to be a corporal, or a corporal to be a ſerjeant, the Colonel is generally regulated by the advice and recommendation of the captains of the ſeveral companies, who muſt be preſumed to have a thorough knowledge of the character and qualifications of each man under their reſpective commands, being daily witneſſes of their performance of duty and behaviour. But both the captains and the Colonel may form miſtaken judgments, which nothing but the actual experience of the corporal or ſerjeant's performance of his new duty can correct: And nothing is more common than that thoſe who have for a time behaved well in the proſpect of promotion, become afterwards careleſs, idle, worthleſs, or refractory. The only check againſt this change of demeanour in a non-commiſſioned officer, is the ſenſe that his good conduct is the ſole ſecurity he poſſeſſes for retaining his rank; and that it is in the power of his Colonel to deprive him of it whenever he judges him unworthy. That this puniſhment will never be inflicted without juſt cauſe, he has ſufficient ſecurity in the regard which a ſuperior officer muſt ever have for his own reputation and character. To make it neceſſary in all caſes to reſort to a Court-Martial, would neceſſarily occaſion ſuch embarraſſment and delay, that a commanding officer would often be prompted to wink at improprieties of conduct, and to put up with inſufficiency in his non-commiſſioned officers, rather than follow out the neceſſary proceſs and formality of a trial. Add to this, what all military men muſt perfectly underſtand, that the whole

of

In general, the ſentence of the Court-Martial declares the priſoner guilty or not guilty of the ſpecial matters of the charge, and in the event of guilty, awards the proper puniſhment. But ſometimes the degree

of a ſoldier's conduct and character taken in the aggregate, may be ſuch as to render him a moſt unfit perſon for having any command; and yet it may be impoſſible to ſpecify any poſitive act to the ſatisfaction of a Court-Martial, which could juſtify a formal ſentence of degradation. This diſcretionary power will never be exerciſed but for cogent reaſons; nor will it ever be abuſed while Britiſh officers retain their diſtinguiſhing characters of honour and humanity. The army, and indeed the nation at large, owe little obligation to thoſe patriotic orators, who, for the purpoſe of a florid declamation on the rights of the ſubject, and from their deep-felt ſenſe (no doubt) of the hardſhips ſuffered by ſo uſeful a body of men as the military force of the ſtate, chooſe in their parliamentary harangues to repreſent this claſs of their fellow-ſubjects as reduced to a ſtate of ſervitude and bondage, of which the ſufferers themſelves are utterly inſenſible. It argues indeed a lamentable want of information, not to know that the Britiſh army is, with reſpect to the condition of its members and their natural rights as ſubjects, in a ſtate as ſuperior to that of the army of any other nation in the world, as our conſtitution is on the whole ſuperior to theirs in the protection it affords, and the franchiſes it confers on all ranks and conditions of its ſubjects. But the propagation of ſuch opinions has not, in general, ſo admiſſible a plea as ignorance for its apology.

gree of criminality actually proved againſt the priſoner, though of the ſame nature, may fall ſhort in extent of the crime contained in the charge or accuſation: as, for example, the crime charged may be deſertion, but the proof may amount to no more than abſence without leave. In ſuch caſe, the court by its judgment ought to acquit from the charge of deſertion, but to find the priſoner guilty of the inferior offence, and award a correſponding puniſhment *. But though this rule ought to be followed where the offence proved is of the ſame nature, though leſs in degree than the crime

* On the trial of Serjeant Samuel George Grant, in March 1792, the charge was, *Adviſing and perſuading* two drummers in the Coldſtream regiment of Guards *to deſert his Majeſty's ſervice*, and enter into the ſervice of the Eaſt India Company, knowing them at the time to belong to the ſaid regiment of guards. The court found the priſoner guilty of having *promoted* and *been inſtrumental* towards enliſting of the ſaid drummers, knowing them at the time to belong to the ſaid regiment of foot-guards, which, though a crime rather inferior, was of the ſame nature with that contained in the charge, and therefore ſentenced the priſoner to be reduced to the rank of a private ſoldier, and to receive a thouſand laſhes.

crime contained in the charge, it will not hold good where the offence proved againſt the priſoner is either of a different nature altogether from that which is charged, or of a higher degree of criminality; for the court is not warranted to go beyond the indictment, nor has the priſoner received a fair or a legal notice to prepare his defence againſt either a different crime, or a higher degree of guilt, than is contained in the charges. If therefore evidence ſhould emerge, in the courſe of the trial, of greater criminality againſt the priſoner, or of his guilt of a ſeparate crime, it is competent for the court, after exhauſting the actual charges, by their proper ſentence, to report their opinion to the commander by whoſe warrant the court is held, and to recommit the party into confinement, in order that he may be brought to a new trial.

General obſervations on the Form and Nature of Sentences of Courts Martial.

The form of the ſentence of the Court-Martial muſt vary according to the circumſtances

cumſtances of the caſe on which it is pronounced; but a few general obſervations may here be made, applicable to all ſentences whatſoever of general Courts-Martial.

As by the tenor of the oath adminiſtered to all the members of the court, they are ſworn, at no time whatſoever, nor upon any account, to diſcloſe or diſcover the particular vote or opinion of any particular member, unleſs required to give evidence of the ſame in a court of juſtice; ſo it is evidently not proper that the ſentence of the Court-Martial ſhould expreſs by what majority of the members it has been pronounced; becauſe that might lead to the diſcovery of particular votes or opinions; nor although the court be unanimous in its judgment, is it proper to expreſs that circumſtance in the ſentence; for this in fact is diſcloſing the votes and opinions of all the members: yet there ſeems to be no impropriety if there ſhould be an unanimous concurrence of the members

bers for a recommendation to the mercy of the Sovereign, that this circumſtance ſhould therein be mentioned, as giving the greater weight to the application, and at the ſame time not leading to any diſcovery of particular opinions reſpecting the ſentence itſelf by which the priſoner has been condemned.

The opinions and ſentences of the court may be either general in their tenor, that is, declaring the priſoner *guilty* or not *guilty* of the articles of charge; or they may be ſpecial, finding certain facts *proved* or not *proved*; in conſequence of which, they declare him guilty or not guilty on thoſe articles: For, in all caſes, the guilt or innocence of the priſoner with reſpect to the particular charges, muſt be pointedly found and declared; otherwiſe the jurors do not diſcharge the whole of their duty, which requires, that they ſhould not only decide whether the facts are proved or not proved,

but likewiſe pronounce their judgment on the criminality of thoſe facts.

It was formerly a very uſual cuſtom, to expreſs in the ſentences of Courts-Martial, the particular Articles of War of which the ſentence declared the priſoner to be guilty of a breach or violation; but the more recent, and the better practice, is to omit all ſuch reference to the Articles of War; as being in itſelf unneceſſary, and frequently affording handle for cavilling, and ſophiſtical objections of irregularity or incongruity with the articles referred to. If the ſentence ſhould be called in queſtion, as not warranted by any poſitive enactment of the Military law, it is the province of the party who thus arraigns the judgment, to prove his objection by pointing out that incongruity; for the preſumption is, that the decrees and judgments of all courts are warranted by law.

For

For a reaſon much a-kin to the above, it would ſeem moſt adviſable for Courts-Martial in their opinions and ſentences, to avoid all unneceſſary minuteneſs, in detailing or ſpecifying the grounds of thoſe opinions and judgments, and in particular to avoid all argument in juſtification of their ſentences; for it is unwiſe in any court to hold forth to the public a challenge to impugn their judgments, or purpoſely to invite to a diſcuſſion of the grounds on which they have proceeded. If a ſentence is general, and without the aſſignment of ſpecial reaſons, it may be defended by all the good reaſons which are applicable to the matter; but if it aſſigns its ſpecial grounds, it muſt ſtand or fall by theſe alone. It muſt at the ſame time be obſerved, that in caſes of a circumſtantial nature, and where the ſentence of the court is not general upon the whole matters of charge, but ſpecial, finding the priſoner guilty of ſome points of accuſation

accuſation and acquitting him of others; as the puniſhment to be awarded ought to be in ſtrict proportion to the meaſure of guilt, ſo it may be extremely proper, in ſuch caſes, to ſpecify in the ſentence the particular grounds of the opinion and judgment of the court.

It is not cuſtomary in the ſentences of Courts-Martial to adjudge or direct the particular mode of the puniſhment where it is a capital one, nor the time or place of its execution; but only in general terms to adjudge the priſoner to ſuffer death; leaving to the power by whoſe authority the ſentence is executed, the manner, the time, and the place of its infliction. The appropriate capital puniſhment of a ſoldier is to be ſhot to death; but capital crimes, when attended with peculiar infamy, are expiated by the more infamous puniſhment of hanging by the neck. *

* It may not be improper to ſubjoin a ſhort account of the forms obſerved in the trial of Military offenders, by a *Conſeil de Guerre*, or Court-Martial, under the French eſtabliſhment;

eſtabliſhment, previous to the late revolution; a detail, which places in the ſtrongeſt point of view, the ſuperiority of our criminal procedure in military matters, to that of a nation to whom the art of war has been more the object of ſyſtematic arrangement and regulation, than to moſt of the other nations of Europe.

As ſoon as any military delinquent was apprehended and committed to priſon, the captain to whoſe company he belonged was required to preſent a memorial to the governor of the place, ſetting forth the crime, and demanding that the priſoner ſhould be brought to trial. The governor having granted his permiſſion in writing upon the memorial, tranſmits it to the major of the garriſon, who is to act in the character of proſecutor. The major orders the priſoner to be brought before him ſtrictly guarded, and after reading to him the charges of which he is accuſed, he demands to hear what he has to urge in his defence, and puts to him whatever interrogatories he thinks proper; taking down his anſwers in writing, which, after being read over to him, the priſoner muſt ſign. The major then examines, in the priſoner's preſence, ſuch witneſſes as can beſt inform of the matters of accuſation; the priſoner being at liberty, on juſt grounds, to object to their competency. The teſtimonies of the witneſſes are then read over to him, and he is aſked what he has to urge in anſwer to their evidence. The ſubſtance of his anſwer is then taken down in writing and ſigned by him. This procedure, (which generally occupies but a few hours), being finiſhed, the major reports to the governor, who orders a *Conſeil de Guerre* to be aſſembled next morning. The court, which for capital trials muſt conſiſt of at leaſt ſeven officers, is compoſed of as many captains of the infantry regiments in garriſon, if for the trial of an officer or ſoldier of foot, and of captains of cavalry, if for an officer or ſoldier of the cavalry. If there is not a ſufficient number of captains, ſubalterns

ſubalterns are allowed to ſupply their place, and even ſerjeants. The *conſeil* being aſſembled in the governor's houſe, the governor officiates as preſident of the court, and the major as proſecutor, and the clerk reads over the whole procedure, before the priſoner is brought in. When this firſt reading is finiſhed, the priſoner is brought before the court, and the whole muſt again be read over in his hearing. The preſident then aſks if he has any thing further to ſtate in his own defence, and previouſly thereto, he adminiſters to him an oath, that he ſhall ſay nothing but the truth. His anſwer is written down by the major, and ſigned by the priſoner. The preſident then aſks him, whether he objects to any of his judges; and if his objection is ſuſtained, the perſon objected to withdraws from the table. He is in the laſt place queſtioned whether he has any accomplices, and his anſwer is recorded. The priſoner is then ſent back into confinement; and the preſident reads the ordonnance or Military law applying to the caſe; the major, as proſecutor, demanding a ſentence agreeable to the law. A ſheet of paper is then given to the youngeſt member of the court, who writes at the top of it his opinion and vote; folding down the paper upon the writing, and preſenting it to the next in order of ſeniority, till all have written down their opinions; that of the preſident being counted as two, when on the ſide of mercy, and as one, when for puniſhment. The preſident then opens the paper, and after arranging the votes, declares the opinion of the majority, and pronounces the ſentence, which is written down by the major, and ſigned by all the members of the court; and immediately thereafter, it is announced to the priſoner, and muſt be carried into execution the ſame day; for neither the governor nor any other ſuperior officer has a power of ſuſpending or remitting a ſentence once pronounced and ſigned. The record of the whole proceedings and ſentence is ſent, on the day following the execution, to the miniſter of war.

CHAP.

CHAP. VIII.

Of Appeals from a Regimental to a General Court-Martial.

BY the 7th ſection of the act for puniſhing mutiny and deſertion, &c. it is enacted, "That no officer or ſoldier being acquitted "or convicted of any offence, ſhall be "liable to be tried a ſecond time by the "ſame or any other Court-Martial for the "ſame offence, *unleſs in the caſe of an appeal "from a regimental to a general Court-Mar-"tial;* and that no ſentence given by any "Court-Martial, and ſigned by the preſi-"dent thereof, ſhall be liable to be reviſed "more than once."

Right of appeal.

By this enactment, it plainly appears that a right of appeal is underſtood to be competent from the ſentences of regimental or garriſon courts to general Courts-

Martial; and as there is not to be found in any part of the Mutiny-Act or Articles of War, any limitation of this right of appeal to particular caſes, or any prohibition of it in others, it muſt be preſumed that a right thus recognized in general terms, and which is founded both in juſtice and expediency, is competent, whatever be the matter or ſubject of trial, to any party who judges himſelf aggrieved by the ſentence of a regimental or garriſon Court-Martial.

How limited. The only limitation of this right ariſes from the conſtitution of all general Courts-Martial. They are not ſubſiſting courts of judicature, open at all times, and to all parties; but being aſſembled by ſpecial warrant for a particular purpoſe, they are not embodied or created at all, unleſs it ſhall appear to the chief military authority, that there is a juſt and reaſonable cauſe for aſſembling them. No military perſon is therefore of abſolute right entitled to demand the aſſembling of a general Court-Martial,

Martial, either for the trial of himſelf or another party, unleſs in one inſtance, afterwards to be mentioned. His requeſt muſt come by petition or memorial before the Commander in Chief, who will judge from all circumſtances, whether the ſame is reaſonable or otherwiſe, and either grant or refuſe it, as he ſhall think proper. Were this not the caſe, or were it in the power of every military perſon to demand of right the aſſembling of general Courts-Martial for every ſuppoſed offence or ſelf-conceived injury or injuſtice, the army, inſtead of a well-organized, regular, and harmonious body, would be a diſcordant maſs, which the malevolent paſſions and turbulent tempers of individuals would keep in perpetual agitation.

But as it is competent for the commanding officer or Colonel of any corps to aſſemble regimental Courts-Martial for the trial of the leſſer offences, and for the puniſhment of non-commiſſioned officers

and ſoldiers; and as ſuch courts, of which the members are often few in number, and theſe frequently young and unexperienced officers, muſt neceſſarily from theſe circumſtances be more ſubject to error in their proceedings and ſentences, than a more numerous and ſelect tribunal of experienced men; it would be a material hardſhip and grievance if thoſe inferior courts were under no controul. It is proper, therefore, that they ſhould ever act under a confirmed ſenſe that their proceedings are ſubject to reviſion by a general Court-Martial, to whoſe judicature the party conceiving himſelf to be aggrieved has it always in his power to appeal, through the medium of the Commander in Chief, who muſt firſt determine whether there are juſt grounds for a review of the ſentence.

There is but one particular caſe in which the Articles of War confer a poſitive right of demanding trial, in the firſt place before a regimental court, and afterwards a right

right of appeal to a general Court-Martial; which is the caſe of an inferior officer, non-commiſſioned officer, or ſoldier, who conceives himſelf to be wronged by his captain, or other officer commanding the troop or company to which he belongs. It is declared by the 2d article of the 12th ſection of the Articles of War, that ſuch officer or ſoldier who thinks himſelf ſo wronged, " is to complain thereof to the " commanding officer of the regiment, " who is hereby required to ſummon a " regimental Court-Martial for the doing " juſtice to the complainant, from which " regimental Court-Martial either party " may, if he thinks himſelf ſtill aggrieved, " appeal to a general Court-Martial: But " if, upon a ſecond hearing, the appeal " ſhall appear to be vexatious and ground- " leſs, the perſon ſo appealing ſhall be " puniſhed at the diſcretion of the ſaid " general Court-Martial." It would hence appear, that in all ſuch caſes of alleged wrong

wrong or injuſtice committed by ſuperior officers towards their inferior officers or private men, the right of appeal cannot be refuſed, but muſt of courſe be granted, by the Commander in Chief's appointment of a general Court-Martial to take cognizance of the cauſe; the only check againſt raſh and ill-founded applications in caſes of the above nature, being the ſtrong certification, that an adequate puniſhment will not fail to attend every unjuſt or groundleſs appeal. The reaſon why a power of appeal is declared to be competent of abſolute right to inferior officers or ſoldiers complaining of being wronged by their ſuperior or commanding officer, is, that a regimental or garriſon Court-Martial have not the power of inflicting any puniſhment on commiſſioned officers: they can do no more than expreſs their opinion, that the complaint is juſt, or the contrary, and reſtore the ſufferer againſt any exiſting grievance; but the injury complained of, however

however flagrant, muſt therefore have remained unredreſſed, as far as puniſhment is concerned, if an appeal to a general Court-Martial had not been declared to be a matter of right to the party aggrieved.

Form of procedure in trials of appeal.

The procedure before a general Court-Martial in caſes of appeal from a regimental or garriſon court, is as follows. The court being conſtituted by proper authority, the parties in the trial are ſummoned to attend, together with all the neceſſary evidence. The appellant ſuſtains, in conjunction with the Judge-Advocate, the part of proſecutor, and the party in whoſe favour the inferior court has given its judgment, is defendant in the cauſe; the charges on the original trial being the matter at iſſue, on the truth or falſehood of which the court of appeal is to decide. The witneſſes examined before the regimental court, who had before given their teſtimony only by ſimple declaration, are now regularly ſworn by the Judge-Advocate, and are entitled, before

before giving evidence, to have their former teſtimony or declaration read over to them; and they may either on oath confirm its tenor in all its parts, or diſſent or vary from the ſame, if their conſcience ſo compel them, or add thereto what they may have formerly omitted. They muſt likewiſe anſwer all pertinent interrogatories put either by the proſecutor and appellant or the defendant, or by the court; and that either in the way of primary examination or croſs-queſtioning. It is competent, moreover, for either of the parties in the appeal to adduce additional evidence, either by the examination of new witneſſes, or the production of writings. The whole of the evidence is taken down in writing by the Judge-Advocate as recorder; and the court deliberate thereon, and pronounce their opinion and ſentence, in the ſame manner as in ordinary trials.

The general regulation of the Articles of War applies to ſentences pronounced on appeal,

appeal, as well as to all others, viz. that no ſentence of a general Court-Martial ſhall be put in execution, till after a report made to his Majeſty of the whole proceedings, or to the officer commanding in chief, or ſome perſon duly authoriſed under the Royal ſign-manual, to confirm the ſame.

Reviſal of a Sentence.

The reviſal of a ſentence by the ſame court which pronounced it, is not, properly ſpeaking, an appeal, which always implies the review by one court of judicature of the ſentences of another. It is no more than a reconſideration of the cauſe by the ſame tribunal, on a remittal and recommendation of the commander, who is authoriſed to approve or to ſuſpend its ſentences: a power of high expediency and good policy, and which has often been exerciſed to the moſt beneficial ends *.

CHAP.

* In October 1798, Patrick Loftus was condemned to death by a general Court-Martial, held in Dublin barracks,

CHAP. IX.

Of Courts of Enquiry.

Court of Enquiry is of the nature of a Grand Jury.

IN conformity to the practice of the Civil courts of criminal juriſdiction, in which no party can be arraigned before his peers for any crime, until a previous court of inqueſt ſhall have declared that there appears

for ſeducing a ſoldier of the name of Kennedy to deſert from his regiment, and join a party of rebels for the purpoſe of committing murder. The proof reſted principally on the teſtimony of Kennedy. An officer of reſpectable rank and character, to whoſe regiment Kennedy had belonged, ſolicited the Lord Lieutenant to order a reviſal of the ſentence; the conſequence of which was, a complete proof that Kennedy was an infamous and perjured wretch, who made a profeſſion of giving falſe evidence, and ſwearing away the lives of his fellow-creatures; and that in this very caſe he had laid a plot to entrap and deſtroy the priſoner Loftus, a ſimple creature, whoſe greateſt offences had been idleneſs and debauchery. The Court-Martial reverſed their own ſentence, and were thus relieved from the moſt dreadful of all reflections, the conſciouſneſs of incautiouſly warranting the ſhedding of innocent blood.

pears ſufficient ground for bringing the accuſed perſon to trial, (an inqueſt which, by the law of England, is termed the Grand Jury, and whoſe place is ſupplied under the law of Scotland by the function of his Majeſty's Advocate), it is underſtood to be conſonant to military law and practice, that in caſes of much importance, and where the facts are various and complicated, or there appears ground for ſuſpecting the juſt foundation of the charges of criminality, or where a crime has been committed, or much blame incurred, without any certainty on whom it ought chiefly to attach, a previous Court of Enquiry ſhould take the matters under their conſideration, and determine, on ſuch evidence as can be brought before them, whether there is or is not ſufficient cauſe for bringing particular perſons to trial for the offence or crime, before a general Court-Martial.

Who may appoint them.

The power of appointing a Court of Enquiry is included in the right of aſſembling general Courts-Martial; for the latter implying the right of judging whether ſuch a meaſure may or may not be expedient, of courſe preſuppoſes the former, as being the beſt means of regulating that judgment. His Majeſty, therefore, or any commander to whom the right of appointing general Courts-Martial is committed under the royal ſign-manual, is authoriſed at all times, in order to decide with more maturity of deliberation, whether ſuch Court-Martial ſhould be aſſembled, to take the opinion of a previous Court of Enquiry *; and it were greatly to be wiſhed that

* Although the power of aſſembling regular *Courts of Enquiry* ſeems to be veſted only in his Majeſty, or in thoſe commanders who have a power of aſſembling general Courts-Martial, it is a practice not unuſual, for the officers of a regiment, on the ſuſpicion of any crime or delinquency being committed by any member of the corps, to hold counſel together on the proper meaſures to be taken; and ſuch aſſembly of the officers, which may be properly termed

that a meaſure in itſelf ſo wiſe, and of ſuch obvious utility, were much more frequently reſorted to than in practice is done; or rather that it were a matter of eſtabliſhed uſage, that no perſon ſhould be put upon his trial before a general Court-Martial, unleſs in conſequence of a previous report by an inqueſt, on evidence laid before them, that there appears ſufficient ground for calling upon the party to defend himſelf judicially againſt the matters of accuſation. A preliminary form of this nature would be of infinite ſervice in the repreſſion of calumnious and frivolous proſecutions; and would tend more than any other meaſure to the checking of that extreme frequency of trials by Court-

termed a *council of enquiry*, is ſometimes held under the order of the Colonel or commanding officer of the corps. A meeting of this kind, however, although they may collect material information, from apparent or known facts, or written evidence of which they may be poſſeſſed, are not authoriſed to examine witneſſes, or record their declarations.

Court-Martial, which has the worſt effect upon the public mind; reflecting diſhonour on the military character in general, ſpreading diſunion and party diviſions among the members of a corps, and frequently laying the foundation of permanent and even fatal animoſities. In many caſes, a Court of Enquiry acting as umpires or arbitrators between the parties, might compoſe differences or explain miſunderſtandings, ſo as to prevent the neceſſity of all farther procedure by actual arraignment and trial.

Their function.

The power of nominating Courts of Enquiry being, as above ſaid, inherently reſident either in the Crown, or in thoſe officers to whom his Majeſty has delegated his authority for calling general Courts-Martial; the opinion of ſuch courts being entirely of the nature of advice or counſel given to his Majeſty or his commanders, has no binding effect as a ſentence againſt the perſon accuſed, who in general is no party

party to their procedure *. In fact, a court of enquiry is not in every caſe called upon or warranted even to give an opinion; but is confined ſolely to the examination of witneſſes on certain points, on the reſult of which examination, the perſon by whoſe authority the court of enquiry is held, is to form his own opinion. Yet although the report of a Court of Enquiry has in no caſe

* It has, however, ſometimes happened, that the perſon on whom the blame or criminality was ſuſpected chiefly to attach, has been called upon for examination by a court of enquiry: but this practice is not founded in juſtice; for it muſt either tempt the party to give a falſe account in order to juſtify his own conduct, or it may lead him to charge himſelf with criminality, which no perſon can be compelled, or even ought to feel himſelf induced, to do. Thus, in the court of enquiry, appointed in November 1757, for inveſtigating the cauſes of the failure of a military expedition to the coaſt of France; Sir John Mordaunt, the commander of the expedition, being himſelf examined, pleaded afterwards with juſtice, when brought to trial by a general Court-Martial, againſt the hardſhip of having been himſelf obliged to furniſh evidence on matters on which he was afterwards to be arraigned as a criminal. There ſeems therefore to be a groſs impropriety in any court of enquiry calling before them for examination any perſon on whom it is ſuppoſed the guilt or blame is to attach.

caſe the poſitive effect of a ſentence, it may in ſome caſes be immediately followed by the puniſhment of the party whoſe conduct has been the object of the enquiry. It is well obſerved by a judicious writer *, that " as it is the prerogative of " the Crown to diſmiſs officers or ſoldiers, " or any other ſervants, from its ſervice, " without any form of trial, ſo far from " objecting to the power of appointing " courts of enquiry being lodged with the " King, whenever his Majeſty ſhall con- " deſcend to leave the examination of " doubtful caſes to ſuch a court, and take " their opinion thereon, previous to the " diſmiſſion of the ſuſpected perſon or per- " ſons, or the bringing of them before a " Court-Martial, where an offender riſks " being puniſhed with more ſeverity; it " may be regarded rather as a mark of " his clemency, and a certain indication " of his love of juſtice and equity." So likewiſe,

* Adye on Courts-Martial.

likewiſe, although no commander in chief having authority to ſummon Courts-Martial, has any power of inflicting a proper penal ſentence, unleſs through the medium of a Court-Martial; yet in the caſe of an officer holding any particular employment or command under the appointment and at the diſcretion of the commander in chief, there can be no doubt, that, on the report of a Court of Enquiry, warranted to examine and to give an opinion upon his conduct, he might, without further procedure, be inſtantly removed or ſuperſeded in ſuch command or employment, by the ſame power which conferred it. In general, however, the report of a Court of Enquiry has no direct effect upon the party accuſed, but is ſubſervient only to the forming of a juſt determination, whether there is or is not ſufficient cauſe for the aſſembling of a general Court-Martial for taking trial of the matters of accuſation.

Members of a Court of Enquiry cannot ſit on the Court-Martial.

As, by the common law, no indictor or juror who has found a true bill againſt a perſon accuſed, can afterwards be put upon the petty jury for the trial of that perſon; ſo, on the ſame equitable principle, it muſt be a ſufficient challenge againſt the member of a Court-Martial, that he had formerly been of a Court of Enquiry for examining into the conduct of the party to be tried. It is no good anſwer to ſay, that the members of a Court of Enquiry do not in reality decide upon the guilt or innocence of any party, but report only that there is matter for a judicial enquiry, and thus they cannot be ſaid to prejudge the cauſe *. It is a ſufficient objection to their admiſſibility as jurors, that they do not come to try the iſſue with a free and unprejudiced mind; but, on the contrary, muſt involuntarily feel themſelves under the

* An argument uſed by Mr Williamſon in his Elements of Military Arrangement, vol. 2. p. 112.

the bias of ſupporting a preconceived opinion.

The members of a Court of Enquiry are not ſworn, as thoſe of a Court-Martial; nor do the witneſſes examined give their evidence upon oath; neither can any perſon be legally obliged to furniſh information or give his teſtimony before a Court of Enquiry. It is, however, a ſubject worthy of conſideration, whether it were not better that this tribunal, in order that it might poſſeſs all the power, and furniſh all the benefits of a Grand Jury, ſhould be conſtituted under the like bond of a ſolemn oath, and have power of compelling the attendance of witneſſes, and receiving their teſtimony likewiſe upon oath *.

* See in the Appendix, No. 5. the Form of the Appointment of a Court of Enquiry by his late Majeſty Geo. II.

CHAP. X.

Of the Office and Duties of a Judge-Advocate.

Judge-Advocate prosecutes in name of the Sovereign.

FOR sustaining the interest of the Crown in trials before a general Court-Martial, an officer is appointed, under the title of Judge-Advocate, to prosecute in the name of the Sovereign; for as, in all criminal trials, the Sovereign, whose laws are violated, is understood to be the party injured, and who is entitled to demand redress, by the punishment of the guilty person, which function in the ordinary courts of law is discharged by his Attorney-General; so in offences against the Military Law, which are not cognizable by the ordinary tribunals, but are declared to be specially so by Court-Martial, the Judge-Advocate is appointed to fulfil a similar duty, and to prosecute in his Majesty's name,

name, all officers and ſoldiers, *commiſſioned* or *in pay*, who ſhall be guilty of any breach of the Military Law, either as contained in the Articles of War, the Mutiny-act, or other regulations iſſued for the government of the army.

His functions are various.

The appropriate functions of the Judge-Advocate, as an eſſential officer in all general Courts-Martial, are various in their nature; and as neither the Mutiny-act nor Articles of War deſcribe them with much preciſion, we are thence obliged, in ſupplement of what is found in thoſe direct authorities, to reſort to the leſs poſitive, though equally binding authority of eſtabliſhed uſage and practice.

His duty in informing the court.

The rubrick or marginal notice of the 6th article of the 16th ſection of the Articles of War bears, " that the Judge-Ad-" vocate is to *inform* and *proſecute*;" but in the body of the article itſelf, there is nothing ſaid with reſpect to the firſt of theſe duties; the only matter expreſsly enacted

enacted being, that he ſhall proſecute in the name of the Sovereign, and adminiſter to the members of the court the oath as therein preſcribed *. Hence it might perhaps be argued, that the word *inform*, uſed in the margin, did not imply a ſeparate duty

* This Article of War is altogether conceived in very looſe and inaccurate terms. It bears, that "the Judge-"Advocate General, or ſome perſon deputed by him, ſhall "proſecute in our name, and, in all trials of offenders by "general Courts-Martial, adminiſter to each member the "oaths, &c. By this enactment, the power of proſecuting in Courts-Martial is limited to "the Judge-Ad-"vocate General, or ſome perſon deputed by him;" although in reality it is cuſtomary for his Majeſty to appoint Judge-Advocates, by ſpecial commiſſion, under his own ſign-manual, to officiate over a certain department of his dominions; which perſons fall neither under the deſcription in the Article of War, of "Judge-Advocate General, nor "perſons deputed by him." Thus, the Judge-Advocate for North Britain, if the Article of War is to be ſtrictly interpreted, would have no title to proſecute in his Majeſty's name in trials held in that country; although his commiſſion under the royal ſign-manual expreſsly gives him that power; a commiſſion which, it is to be obſerved, is inaccurately conceived in its own *terms*, in as much as it ſtyles that officer *deputy* Judge-Advocate, who does not hold his commiſſion by deputation, but by direct and primary appointment of his Majeſty, and who has a power of delegation, or appointing his own deputies, by commiſſion from himſelf.

duty from that of profecuting; but was uſed here as ſynonymous with the words *accuſe* or *indict*, and, as ſo taken, was included in the duty of profecuting. Eſtabliſhed uſage muſt here, however, be called in, to clear up an ambiguity of expreſſion; and, on that authority, we are warranted to ſay, that the ſenſe annexed here to the word *inform*, implies a diſtinct duty of the Judge-Advocate, viz. that of inſtructing or counſelling the court, not only in matters of eſſential and neceſſary form, with which he muſt be preſumed to be from practice moſt thoroughly acquainted; but in explaining to them ſuch points of law as may occur in the courſe of their proceedings, and with reſpect to which the Articles of War or Mutiny-act may be ſilent. For it is to be obſerved, that in all matters touching the trial of crimes by Court-Martial, wherever the Military law is ſilent, the rules of the common law of the land, to the benefit of which all Britiſh ſubjects are entitled

entitled for the protection of life and liberty, muſt of neceſſity be reſorted to; and every material deviation from theſe rules, unleſs warranted by ſome expreſs enactment of the Military code, is, in fact, a puniſhable offence in the members of the Court-Martial, who may be indicted for the ſame in the King's ordinary courts. Hence ariſes the abſolute neceſſity for ſome member of the court being verſant in the general doctrines of the law, in as far as they relate to the trial of crimes and the weighing of evidence: And the perſon to whom the court is naturally to look for information of this kind, is the Judge-Advocate, who is either by profeſſion a lawyer, or whoſe duty, if he is not profeſſionally ſuch, is to inſtruct himſelf in the common law and practice of the ordinary courts in the trial of crimes.

In the performance of this duty, the Judge-Advocate will always be guided by a juſt ſenſe of his official character and ſituation.

tuation. As he has no judicial power, nor any determinative voice, either in the ſentences or interlocutory opinions of the court, ſo he is not entitled to regulate or dictate thoſe ſentences or opinions, or in any ſhape to interfere in the proceedings of the court, further than by the giving of counſel or advice; and his own diſcretion muſt be his ſole director in ſuggeſting when that may be ſeaſonable, proper, or neceſſary. On every occaſion when the court demands his opinion, he is bound to give it with freedom and amplitude; and even when not requeſted to deliver his ſentiments, his duty requires that he ſhould put the court upon their guard againſt every deviation, either from any eſſential or neceſſary forms in their proceedings, or a violation of material juſtice in their final ſentence and judgment. A remonſtrance of this nature, urged with due temperance and reſpect, will ſeldom, it is to be preſumed, fail to meet with its proper regard from the court; but ſhould it happen that

an illegal meaſure or an unjuſt opinion is nevertheleſs perſevered in, the Judge-Advocate, though not warranted to enter his diſſent in the form of a proteſt upon the record of the proceedings, (for that implies a judicative voice), ought to engroſs therein the opinion delivered by him upon the controverted point, in order not only that he may ſtand abſolved from all imputation of failure in his duty of giving counſel, but that the error or wrong may be fairly brought under the conſideration of that power with whom it lies, in the laſt reſort, either to approve and order into effect, or to remit, the operation of the ſentence.

His duty in aſſiſting the priſoner in his defence.

Another part of the official duty of the Judge-Advocate, which, though not enjoined by any particular enactment of the Military Law, has yet the ſanction of general and eſtabliſhed practice, is, that he ſhould aſſiſt the priſoner in the conduct of his defence. This duty is more eſpecially incumbent

incumbent on the Judge-Advocate in caſes where the priſoner has not the aid of profeſſional counſel to direct him, which generally happens in the trials of private ſoldiers, who, wanting all advantages of education, or opportunities of mental improvement, muſt ſtand greatly in need of advice in ſuch trying circumſtances as are ſufficient often to overwhelm the acuteſt intellect, and embarraſs or ſuſpend the powers of the moſt cultivated underſtanding. It is certainly not to be underſtood, that in diſcharging this office, which is preſcribed ſolely by juſtice and humanity, the Judge-Advocate ſhould, in the ſtricteſt ſenſe, conſider himſelf as bound to the duty of a counſel in exerting his ingenuity to defend the priſoner, at all hazards, againſt thoſe charges which, in his capacity of proſecutor, he is, on the other hand, bound to urge, and to ſuſtain by proof; for, underſtood to this extent, the one duty is utterly inconſiſtent and incompa-

tible with the other. All that is required is, that, in the ſame manner as in the Civil courts of criminal juriſdiction, the judges are underſtood to be of counſel with the perſon accuſed; the Judge-Advocate, in Courts-Martial, ſhall do juſtice to the cauſe of the priſoner, by giving its full weight to every circumſtance or argument in his favour; ſhall bring the ſame fairly and completely into the view of the court; ſhall ſuggeſt the ſupplying of all omiſſions in the leading of exculpatory evidence; ſhall engroſs in the written proceedings all matters, either directly or by preſumption, tending to the priſoner's defence; and finally, ſhall not avail himſelf of any advantage which his ſuperior knowledge or ability, or his influence with the court, may give him, in enforcing the conviction, rather than the acquittal, of the perſon accuſed.

Many of the official functions of the Judge-Advocate, in the trial before a general

neral Court-Martial, and in the matters preparatory and relative thereto, have been occaſionally mentioned in the preceding chapters; but, for the ſake of greater perſpicuity, they ſhall be here recapitulated in a regular detail, in which may likewiſe be noticed ſuch other particulars of the duty of this officer as have not hitherto occurred to obſervation.

He muſt arrange all matters preparatory to the trial.

When a Court-Martial is ſummoned by the proper authority for the trial of any military offender, the Judge-Advocate being required to attend his duty, and furniſhed with the articles of accuſation or charge on which he is to proſecute, muſt, from the information of the accuſer, inſtruct himſelf in all the circumſtances of the caſe, and by what evidence the whole particulars are to be proved againſt the priſoner. Of theſe it is proper that he ſhould prepare in writing a ſhort analyſis, or plan, for his own regulation in the conduct of the trial, and examination of the witneſſes.

witneſſes. He ought then to give the earlieſt intimation to the priſoner of the time and place appointed for his trial, and furniſh him at the ſame time with a true copy of the charges that are to be exhibited againſt him, with the names and deſignations of the witneſſes by which they are to be proved or ſupported; and likewiſe a correct detail of the members of the Court-Martial. He ſhould at the ſame time require from the priſoner a liſt of thoſe witneſſes whom he intends to adduce in his exculpation, that the privilege may be mutual to both parties, of objecting to ſuch evidence as they may judge either inadmiſſible or of ſuſpected credibility. The Judge-Advocate ought then to ſummon the witneſſes for the proſecution to give their attendance at the time and place appointed; and this either by a direct intimation from himſelf to each of thoſe witneſſes, or by an application to the commanding officers of the regiments or parties

parties to which they belong, requeſting that they may be warned to attend that duty. It is proper, likewiſe, that he ſhould deſire the priſoner to make a ſimilar application, to enforce the attendance of the witneſſes neceſſary for his defence. Theſe meaſures ought to be taken as early as poſſible, that there may be ſufficient time for the arrival of witneſſes who may be at a diſtance *.

It ſeems in no caſe to be improper, and may often tend to material juſtice, as well as to the ſhortening of judicial proceedings, that the Judge-Advocate, on whom lies the conduct of the evidence for the proſecution, and the diſcretionary power of examining ſuch witneſſes only as he may deem neceſſary, ſhould previouſly be acquainted with the general nature and ſcope of the priſoner's defences; and for that

* As to the indemnification of witneſſes for their travelling and neceſſary charges, ſee *ſupra*, p. 310.

that purpoſe, that he ſhould either converſe with himſelf, or with his counſel, before proceeding to trial. It has ſometimes happened, that by a timely explanation in ſuch previous conference, circumſtances of the charge, apparently the moſt unfavourable, have been alleviated or done away, and even the neceſſity of a trial altogether ſuperſeded, by the anticipation which ſuch a conference afforded, of a judgment of acquittal from the chief matters of accuſation.

His duty as Recorder of the Court.

When the court is met for trial, and the members are regularly ſworn, the Judge-Advocate, after opening the proſecution by a recital of the charges, together with ſuch detail of circumſtances (if the caſe is circumſtantial and complicated) as he may deem neceſſary, proceeds to examine his witneſſes in ſupport of the charges; while at the ſame time he acts as the recorder or clerk-regiſter of the court, in taking down the evidence in writing at full length, and

and as nearly as poſſible in the words of the witneſſes. (See *ſupra*, ch. 4. ſect. 3.)

At the cloſe of the buſineſs of each day, and in the interval before the next meeting of the court, it is the duty of the Judge-Advocate to make a fair copy of the proceedings; which he continues thus regularly to engroſs, to the concluſion of the trial, when the whole is read over by him to the court, before the members proceed to deliberate and form their opinions.

Of his duty in collecting the opinions and votes of the members upon the ſeveral articles of the charge, after they have fully deliberated on the ſame, and laſtly, in recording the final ſentence of the court, we have fully treated in the preceding chapter vii.

The ſentence of the court muſt be fairly engroſſed, and ſubjoined to the record-copy of the proceedings; and the whole muſt be authenticated by the ſubſcription of the Preſident of the court and that of the Judge-Advocate.

It is required by the Mutiny-act, § 16. "That every Judge-Advocate, or perſon "officiating as ſuch at any general Court-"Martial, ſhall tranſmit, with as much ex-"pedition as the opportunity of time and "diſtance of place can admit, the original "proceedings and ſentence of ſuch Court-"Martial, to the Judge-Advocate General "in London, which original proceedings "and ſentence ſhall be carefully preſerved "in the office of the ſaid Judge-Advocate "General, to the end that all perſons en-"titled thereto may be enabled, on appli-"cation to the ſaid office, to obtain copies "thereof." And by the preceding ſection 15. it is enacted, That the party tried by any general Court-Martial within Europe, (except in the garriſon of Gibraltar), ſhall be entitled to a copy of the ſentence and proceedings of the ſaid court, on demand made by himſelf, or by any perſon on his behalf, (they paying reaſonably for the ſame), at any time, not ſooner than three months,

months, after ſuch ſentence; and in the caſe of trials at Gibraltar, not ſooner than ſix months after the ſaid ſentence; or twelve months, if the Court-Martial has been held in foreign parts, or in his Majeſty's dominions beyond ſeas.

It is proper that the Judge-Advocate, or the perſon officiating as ſuch, ſhould retain in his own poſſeſſion, and carefully preſerve, the original minutes of the proceedings drawn up by him in court during the courſe of the trial, and likewiſe his notes of the opinions and votes of the members; that in caſe of any after queſtions that may be moved in the ordinary courts of law or in parliament, touching the conduct or reſult of the trial, the Judge-Advocate may have recourſe to them as neceſſary documents, if he ſhould be called upon to give evidence in relation thereto.

CHAP. XI.

Concluſion of this Treatiſe—Of the Extenſion of Martial Law in times of Danger to the State.

Three conſequences of the preceding doctrines.

FROM the general ſcope of the doctrines maintained in the preceding Eſſay, three propoſitions may be fairly deduced:

1*ſt*, That the Military law which obtains in theſe kingdoms, reſts on the ſame baſis of legality with the common and ſtatute laws of the land.

2*d*, That the Military law is a wiſe, equitable, and humane ſyſtem, attempered to the ſpirit of our free conſtitution, authoriſing only ſuch reſtraints as are abſolutely neceſſary for the regulation and diſcipline of the army, on which depends the maintenance of the national ſecurity, and, by neceſſary conſequence, the enjoyment of all our civil rights and franchiſes.

3*d*, That,

3*d*, That, under the Britiſh conſtitution, the Military law does in no reſpect either ſuperſede or interfere with the Civil law of the realm: that the former is in general ſubordinate to the latter; but as, in every well regulated government, all the parts ſhould harmonize and mutually aſſiſt the operation of each other; ſo, by our conſtitution, the Military law gives its aid in many caſes to the execution of the Civil; as the Civil, in its turn, ſupplies the deficiencies of the Military, and aſſiſts, wherever it is neceſſary, its operation *.

This perfect harmony between the civil and the military powers of the ſtate, depends on each having its peculiar province clearly and accurately defined: and the particular caſes being diſtinctly ſpecified, in which the one power is called upon to co-operate with the other, there can be no encroachment which ſhall not immediately be perceived, and of courſe meet with its due correction.

Such

* See *ſupra*, p. 157.—164.

Such is the regular tenor of the operations of the civil and military law, in times when the ſtate enjoys its ordinary tranquillity. But there are extraordinary ſeaſons, when the body-politic, like the natural, is affected by diſeaſe, and when abſolute neceſſity authoriſes the application of extraordinary remedies. In ordinary times, the perſonal liberty of individuals cannot be abridged at the mere diſcretion of any magiſtrate, nor without the production of the priſoner in court, a certification of the cauſe of his detainer, and a decree of the judge declaring it to be legal. But in times of turbulence and danger, theſe ſecurities of perſonal liberty muſt yield to the greater object, the ſecurity of the ſtate; and the legiſlature authoriſes for a time a ſuſpenſion of the ſtatute of *Habeas corpus*. So likewiſe the common and ſtatutory law, which, in ordinary times, is adequate to the coercion of all offences, may be found, in times of extraordinary turbulence and alarm,

alarm, utterly inadequate to the repreſſion of the moſt dangerous crimes againſt the ſtate. The ſlow and cautious procedure of the King's ordinary courts of juſtice, keeps no pace with that daring celerity which attends the operations of rebellion; nor are their regulated forms and publicity of procedure fitted to bring to light the dark deſigns of a conſpiracy. In ſuch ſeaſons, therefore, the conſtitution poſſeſſes in itſelf that remedy which is neceſſary for its own preſervation. By the *Declaration of Rights*, that important deed by which the liberties of the ſubject were aſcertained and ſettled at the Revolution, the power of diſpenſing with the laws, or ſuſpending their execution, which in former times was exerciſed by the Sovereign, is declared to be illegal, if *without the conſent of parliament*. Its legality, therefore, *with the conſent of parliament*, is of conſequence plainly recognized: and as, when emergency requires, the *Habeas corpus* act is for a time ſuſpended,

ſuſpended, by the joint will of the King and the two houſes of parliament; ſo, by the ſame authority, in times of actual rebellion, Martial law, and the mode of ſummary trial by Courts-Martial, is enacted for a limited time, either over a part or the whole of the kingdom where ſuch rebellion may exiſt.

The form of enactment of Martial Law.

The ſtatute for the enactment of Martial Law, ordinarily proceeds on a narrative of its inductive cauſes, in order that the ſubjects in general may be certified of the neceſſity of this ſtrong meaſure; and that, while the full extent of its object is perceived, no unneceſſary alarm may be excited in the minds of the innocent and well-affected part of the community. The right of the Legiſlature to adopt this violent but neceſſary remedy, and to inveſt the Crown with this extraordinary power of the ſword, is likewiſe pointedly aſſerted on conſtitutional principles, that all may perceive its entire legality. It is then declared,

clared, that it ſhall be lawful for his Majeſty, or for any chief governor or commander whom he ſhall appoint, during the continuance of the rebellion, and that whether the ordinary courts of juſtice ſhall or ſhall not be open, to iſſue his or their orders to all officers commanding his Majeſty's forces, and to all others whom he or they ſhall think fit to authoriſe, to take the moſt vigorous and effectual meaſures for ſuppreſſing the ſaid rebellion, in any part of the kingdom, which ſhall appear to be neceſſary for the public ſafety, and for the ſafety and protection of the perſons and properties of his Majeſty's peaceable and loyal ſubjects; and to puniſh all perſons acting, aiding, or aſſiſting in ſuch rebellion, either by death or otherwiſe, as to them ſhall ſeem expedient. The ſtatute likewiſe ordinarily gives a power to arreſt or detain in cuſtody all ſuſpected perſons, and to cauſe them to be brought to trial in a ſummary manner by Courts-Martial,

and to execute the ſentences of all ſuch courts, whether of death or otherwiſe. It declares, moreover, that no act done in conſequence of theſe powers ſhall be queſtioned in any of the King's ordinary courts of law; and that all who act under the authority of ſuch ſtatute ſhall be reſponſible for their conduct in the ſame only to ſuch Courts-Martial *.

Such is that moſt energetic, but formidable remedy which reſides in the Britiſh Conſtitution, for the correction of thoſe diſorders which bid defiance to the ordinary vigour of the laws; a remedy warranted only by the laſt neceſſity, and therefore to be commenſurate in the endurance of its operation to the immediate ſeaſon of extreme danger. But the power of calling forth this extraordinary antidote againſt thoſe evils which would otherwiſe deſtroy the ſtate, is in itſelf one of the greateſt bleſſings which we owe to our free government.

* See Appendix, No. VI.

ment. Of ſuch temporary reſtraint on the natural liberty of the ſubject none will ever complain, but thoſe on whom that reſtraint is neceſſary. The good man and the worthy citizen feels no hardſhip in that law, which holds out its terrors only to the enemies of his country. Even the philoſopher and ſpeculative politician will ſubſcribe to the wiſdom of that expedient, which requires us *to part with our liberty for a while, in order that we may preſerve it for ever.*

APPENDIX.

N° I.

Of the Ancient Aſſize of Arms, and Commiſſion of Array.

BY the Aſſize of Arms, as ſettled in the reign of Henry II. *A. D.* 1181, " Every perſon poſſeſſed " of a Knight's fee was to have a coat of mail, " an helmet, a ſhield, and a lance, and as many " of theſe as he had fees. Every free layman " that had in goods or rents to the value of " 16 marks, was to have the ſame arms; and " ſuch as had 10 marks were to have a leſſer " coat of mail, an iron cap, and a lance; the " two laſt of which, with a *wambois*, (*i. e.* a " coat quilted or ſtudded with ſome material pro- " per to reſiſt the ſtroke of a weapon), were aſ- " ſigned for the arms of burgeſſes, and all the " freemen of boroughs. Theſe arms were all to " be provided before the feaſt of St Hilary next " following. None obliged to have them, could " either ſell, pawn, lend, or part with them out

" of

" of his cuſtody; nor could a Lord take them " from his vaſſal, either by forfeiture, gift, ſecu- " rity, or in any other manner. When the poſ- " ſeſſor died, they deſcended to his heir; and if " this heir was a minor, his guardian was to have " the cuſtody of his arms, as well as body; and " till the heir came of age, he was to find a man " to uſe them in the King's ſervice. The itine- " rant juſtices were charged with the care of the ex- " ecution of this ordinance, and had a power as well " of examining all perſons upon oath as to the va- " lue of their eſtate, as of obliging them to ſwear " that they would be faithful to the King, and keep " theſe arms for his ſervice and the defence of the " kingdom. No man was to keep more arms " than he ought by this aſſize; nor were any to " be ſold or carried out of the realm. This laſt " prohibition likewiſe extended to ſhips and tim- " ber." *Benedict.* p. 365.

Henry II. eſtabliſhed a ſimilar regulation in his foreign dominions, which comprehended a large portion of France, viz. Guienne, Poitou, Saintonges, Auvergne, the Limouſin, Perigord, Angoumois, Anjou, Maine, Touraine, Normandy, and Britany; and his cotemporary Philip Auguſtus was ſo ſenſible of the wiſdom of thoſe inſtitutions, (or as Carte plauſibly ſuppoſes, ſo alarmed at them), that he immediately eſtabliſhed the ſame in his own kingdom.

At

At the diſtance of a century, a new Aſſize of Arms was enacted by the ſtatute of Wincheſter, paſſed 13th Edward I. *A. D.* 1285, ſettling the number and quality of the weapons of offence and defence, with which each perſon, according to the value of his eſtate or property, was bound to provide himſelf. It was likewiſe ordained, "That "view of armour be made every year two times; "and in every hundred and franchiſe, two con- "ſtables ſhall be choſen to make the view of "armour; and the conſtables aforeſaid ſhall pre- "ſent before juſtices aſſigned, ſuch defaults as "they do ſee in the country about armour; and "the juſtices aſſigned ſhall preſent at every par- "liament, unto the King, ſuch defaults as they "ſhall find, *and the King ſhall provide remedy* "*therein.*"

Theſe ſtatutory enactments, for the ſecurity and defence of the kingdom, ſuperſeded the neceſſity of a ſtanding army, and were free from ſome of its inconveniencies. To enforce the obſervance of theſe regulations in time of peace, the above-mentioned proviſo, of an inſpection at ſtated times by the conſtables, was deemed ſufficient; but ſomething more was requiſite when the kingdom was either actually engaged in war, or in the apprehenſion of imminent danger. At ſuch ſeaſons, therefore, it was cuſtomary for the King to iſſue commiſſions to experienced officers, to draw out

out and array the fitteſt men for ſervice in each county, and to march them to the ſea-coaſts, or to ſuch other quarters of the country as were judged to be moſt in danger. Of theſe *Commiſſions of Array* there are many hundreds in the Gaſcon and French rolls in the Tower of London, from the 36th of Henry III. to the end of the reign of Edward IV. They became however leſs cuſtomary, as foreign wars became leſs frequent; and in the reigns of Henry VIII. and Elizabeth, it was thought more expedient to eſtabliſh Lords-Lieutenants and deputies in the ſeveral counties as ſtanding officers, for aſſembling and muſtering the military force in caſe of danger or alarm from the enemy.

The ſtatutes of Armour were repealed by 2d Jac. I. c. 25. and 21ſt Jac. I. c. 28. The form of the ancient Commiſſions of Array may be ſeen in Ruſhworth's Hiſtorical Collections, *ſub. an.* 1640; when they were attempted to be revived by Charles I. in conſequence of a bold invaſion of the prerogative of the Crown by the Parliament, in naming their own commiſſioners for levying and muſtering troops in various parts of the kingdom. The commiſſions granted by King Charles, though drawn up in the very words of that which had been iſſued in the reign of Henry IV. were voted illegal and unconſtitutional by that Parliament, which had immediately before arrogated to itſelf

itſelf the command of the militia, and was thus proceeding in its regular plan of overthrowing the conſtitution, by aſſailing, in its turn, every legal prerogative of the Sovereign, previous to the utter abolition of his function and dignity.

N° II.

Of the Offices of High Conſtable and Marſhal, and of the Powers of the Court of Chivalry.

THE Conſtable and Marſhal were officers of eminent importance and dignity in all the feudal governments of Europe. The title of Conſtable, or *comes Stabuli*, explains the original nature of this office, which was that of commander of the cavalry; and as theſe were the principal ſtrength of the Imperial or Royal armies, this officer became naturally the Commander in Chief of thoſe armies. The office of Marſhal appears originally to have been of a much inferior nature, the perſon who exerciſed it being the actual ſuperintendant of the ſtables or chief of the equerries, whoſe duty was to furniſh the provender for the horſes, and to overſee their proper management. But in proceſs of time this office grew into high conſideration, and the Marſhal, ſubordinate only

to the Conſtable, became the ſecond in command of the armies, and in the abſence of the latter, ſupplied his place.

In England the offices of the High Conſtable and Marſhal were not only *miniſterial* in the actual command and regulation of the army, but *judicial*, as poſſeſſing, by delegation from the Sovereign, the right of deciding in all matters touching war, both within and without the kingdom *, a

* "In England, the High Conſtable is an officer of great "honour and authority, appointed and ordayned in the be- "ginning for the aſſiſtance of the King in martial affayres, "and came into this realm out of France, as is moſt like- "ly, and to them out of the empire." *Diſcourſe by Mr Leigh in Hearne's Diſcourſes by eminent Antiquaries.*

"Cognoſcunt Conneſtabilis et Mareſcallus in curia mi- "litari, de criminibus perpetratis extra regnum Angliæ, de "contractibus factis apud exteros, et de rebus quæ ad bel- "lum et arma ſpectant, ſive in regno Angliæ, ſive apud "exteros." *Duc. de autoritate, Jur. Civ.*

"To determine the ſuites in camp, the Conſtable and "Mareſhall do hold a court. By Gervaſius Tilburienſis "the Mareſhall and Conſtable doe take account of all the "ſtipendary ſouldiers, giving them allowance or diſcharge. "They make certificates, whether the knights have ſerved, "according to tenure, their full terms." *Sir Rob. Cotton's Diſc. in Hearne's Diſcourſes by eminent Antiquaries.*

In a Diſcourſe by Mr Agard (12th Feb. 1602) on the antiquity and office of the Marſhal of England, the powers of the Conſtable and Marſhal are pretty fully enumerated. "For warres the Marſhal is next to the High Steward and "Conſtable,

a power which, probably from the looſeneſs of the terms in which it was conferred, theſe officers gradually extended to a moſt formidable uſurpation on the department of the common law, and the juriſdiction of the ordinary civil courts of the realm. To ſuch extent had this grievance arrived, that in the reign of Richard II. it was neceſſary to correct it by a particular ſtatute, 13th R. II. c. 2. which, while it puts an end to the uſurped authority of the High Conſtable and Marſhal, diſtinctly aſcertains the extent of their lawful juriſdiction. "*Item*, Becauſe the Commons "do make a grievous complaint that the Court "of

"Conſtable, the chief officer having charge of all things "that may tend either to the benefit or ſurety of the ar-"my: where he keepeth a Martial Court of pleading, "as I have ſeen in theſe words: *Placita exercitus regis "apud werke, &c. anno regni R. E. 24to*, which court was "kept in the preſence of the Steward, Conſtable, and "Marſhall, as I gather by the pleading: before whom "were pleaded treſpaſſes and hurts done by one ſoul-"dier to another. *Item*, It appeareth that it was not law-"ful for any ſouldier to arreſt another, but by the Marſhall, "elſe puniſhable. *Item*, He puniſhed all victuallers that "ſold, regrated, or foreſtalled victuals. *Item*, He puniſh-"ed all thoſe that failed in watching and warding. *Item*, "He made proclamations in the King's name, that none "ſhould break arraye, or march before the King's ſtand-"ard or other ſtandards, but by the direction of the Con-"ſtable and Marſhall; and inflicted by the ſaid proclama-"tion puniſhment or death."

" of the Conſtable and the Marſhall hath in-
" croached to him, and daily doth incroach con-
" tracts, covenants, treſpaſſes, debts and detinues,
" and many other actions pleadable at the com-
" mon law, in great prejudice of the King and
" of his courts, and to the great grievance and
" oppreſſion of the people; Our Lord the King,
" willing to ordain a remedy againſt the preju-
" dices and grievances aforeſaid, hath declared
" in this parliament, by the advice and aſſent of
" the Lords Spiritual and Temporal, the power
" and juriſdiction of the ſaid Conſtable, in the
" form that followeth: To the Conſtable it per-
" taineth to have cognizance of contracts touch-
" ing deeds of arms and of war out of the realm,
" and alſo of things that touch war within the
" realm, which cannot be determined nor diſcuſ-
" ſed by the common law, with other uſages and
" cuſtoms to the ſame matters pertaining, which
" other Conſtables heretofore have duly and rea-
" ſonably uſed in their time; joining to the ſame,
" that every plaintiff ſhall declare plainly his mat-
" ter in his petition, before that any man be ſent
" for to anſwer thereunto. And if any will com-
" plain that any plea be commenced before the
" Conſtable and Marſhall that might be tried by
" the common law of the land, the ſame plaintiff
" ſhall have a privy ſeal of the King without dif-
" ficulty, directed to the ſaid Conſtable and Mar-
" ſhall,

" ſhall, to ſurceaſe in that plea, until it be diſ-
" cuſſed by the King's council, if that matter
" ought of right to pertain to that court, or other-
" wiſe to be tried by the common law of the
" realm of England, and alſo that they ſurceaſe
" in the mean time."

A commiſſion for the office of High Conſtable of England, granted above a century after this period, viz. in the 7th year of Edward IV. to the Earl of Rivers, is of importance in ſhowing the very extenſive powers of this office, even after the above reſtrictory ſtatute. It contains the following clauſes.

" Rex, &c. De gratia noſtra ſpeciali, conceſ-
" ſimus eidem Comiti de Ryvers dict. officium
" Conſtabularii Angliæ, habendum, occupandum,
" &c. per ſe. vel ſufficientes deputatos ſuos,—pro
" termino vitæ ſuæ, in omni et ſingulis quæ ad
" idem officium pertinent.—Et ulterius—plenam
" poteſtatem et authoritatem damus et concedi-
" mus, ad cognoſcendum et procedendum in om-
" nibus et ſingulis cauſis et negotiis de et ſuper
" crimine læſæ majeſtatis, ſeu ipſius occaſione,
" cæteriſque cauſis quibuſcunque—quæ in curia
" Conſtabularii Angliæ ab antiquo, viz. tempore
" dicti Domini Gulielmi Conqueſtoris, progeni-
" toris noſtri, ſeu aliquo tempore citra, tractari,
" audiri, examinari, et decidi conſueverunt, aut
" de jure debuerunt ſeu debent, cauſaſque et ne-
" gotia

" gotia prædicta, cum omnibus et ſingulis emer-
" gentibus, incidentibus, et connexis, audien-
" dum, examinandum, et fine debito terminan-
" dum, etiam ſummariè et de plano, ſine ſtrepitu
" et figura judicii, ſola facti veritate inſpecta, ac
" etiam manu regia, ſi opportunum viſum fuerit
" eidem Comiti de R. vices noſtras *, appella-
" tione remota.

" Ex mero motu et ſcientia prædicta noſtra,
" ſimiliter committimus plenariam poteſtatem
" cum cujuſlibet pœnæ et mulctæ, et alterius co-
" hercionis legitimæ executioniſque rerum, quæ
" in hac parte decreverit facultatem, cæteraque
" omnia quæ ad officium Conſtabularii Angliæ
" pertinent faciendum, aliquibus ſtatutis, acti-
" bus, &c. aut alia aliqua re, &c. non obſtante,"
&c. *Spelman, Gloſſ.* voce *Conſtabularius.*

* *Supplendo*, or ſome ſuch word, is probably wanting here.

From this very curious document, the following remarkable particulars occur to our obſervation.

1. An office of the higheſt criminal juriſdiction, in a great variety of offences, of which the nature is no otherwiſe defined than by uſe and cuſtom, (which had led, as we have ſeen, to the moſt illegal encroachments and violation of the laws of the realm), is conferred upon a ſingle individual, for life, and even with a power of exerciſing it by deputies. 2. This juriſdiction is declared to be free from, and unfettered by all the uſual forms

of

of judicial procedure in the trial of crimes. There is not even to be the appearance of a trial *(ſine ſtrepitu et figura judicii)*. The judge, after enquiring ſimply into the truth of the fact, *(ſola facti veritate inſpecta)*, that is, ſatisfying himſelf of its truth, in any manner he ſhall think fit, may inſtantly, and upon the ſpot, *(ſummariè et de plano)*, decide the caſe, and award *any puniſhment* that to him may ſeem proper, *(cujuſlibet pœnæ et mulctæ, et alterius coercionis legitimæ facultatem*, &c.*)*. 3. This judge may make uſe of the *King's name* to carry his ſentences into execution, and no appeal to the King is competent againſt his decrees.

In peruſing this moſt extraordinary commiſſion, we are naturally led to exclaim, What was the conſtitution of England at this time? What bounds had the prerogative of the Sovereign, or what protection did the laws afford to the ſubject? The anſwer is obvious: The ſtate of the kingdom at this time, torn by the contending factions of York and Lancaſter, precludes all reaſoning from this fact, as to the conſtitutional powers of the Crown. We cannot judge of the conſtitution of England from the adminiſtration of a government perpetually ſhifting from one rival family to another, eſtabliſhed by the proſperous iſſue of one day's combat, and loſt by a ſimilar chance the next. As the ſword gave the crown, ſo it was maintained by the ſword; and the Prince felt for the time no limits

to

to his authority, while he commanded a victorious army. As all reſiſtance was neceſſarily treaſon, whoever eſcaped from the field, was doomed to fall upon the ſcaffold; but the ordinary courſe of juſtice was not an engine ſufficiently quick, nor even altogether certain in its operation; and the Sovereign, by an ample commiſſion to his High Conſtable, to decide *ſummarie et de plano*, in all treaſons, and in every thing that had but an affinity to that crime of moſt extenſive conſtruction, took that method which he might conceive the emergency juſtified, and to which the precarious tenure of his own power neceſſarily prompted him. That ſuch exertion of authority was unjuſtifiable upon any conſtitutional principle, there needs no argument to prove.

We muſt therefore look back to the ſtatute, 13th Ric. II. c. 2. as fixing the real and conſtitutional powers of the Conſtable, and limiting his juriſdiction to "contracts touching deeds of "arms and of war out of the realm, and all "things that touch war within the realm, and "which cannot be determined by the common "law:" And hence we muſt conclude, that he was the judge to whoſe ſole cognizance belonged all military offences, and to whom was excluſively committed the enforcement of the Martial law of the kingdom; an officer, in ſhort, diſcharging that extenſive duty, which, in modern times, belongs to the Sovereign of England, as head

head of the army, and of which he exerciſes the judicial part through the medium of his Courts-Martial.

But what we have hitherto ſaid touches only the judicial powers of the Conſtable, or what Spelman terms his *munus forenſe:* his powers as a field-officer (*munus caſtrenſe*) were equally ample and dignified. The Conſtable was ſubordinate only to the King in the command of the army; and even when the King was actually in the field, the efficient command of the troops ſeems to have been in this officer, and all general orders were iſſued jointly in the Sovereign's name and in the Conſtable's.

Immediately ſubordinate to him, was the Marſhal, who, while the Conſtable was preſent, exerciſed no authority, unleſs by his command; but, in his abſence, fulfilled all his functions. Both the military and the judicial powers of the Conſtable appear to have been delegated to the Marſhal; for the reſtrictory ſtatute * of Richard II. applies

* In ſome caſes, the certificate of the Marſhal was equal to a trial by law. "Where the King," ſays L. C. Coke, "maketh a voyage royal into Scotland, and the eſcuage is "aſſeſſed by parliament, if the lord diſtraine his tenant "that holdeth of him by the ſervice of a whole knight's "fee for the eſcuage ſo aſſeſſed, and the tenant pleadeth, "and will averr, that he was with the King in Scotland by "forty dayes, and the lord will averr the contrary; it is "ſaid

applies equally to both thoſe officers. And Sir Edward Coke, in the following paſſage, declares both the joint juriſdiction of theſe officers, and the mode of proof on which they gave their ſentences:

"If a ſubject of the King be killed by another "of his ſubjects in any foreign country, the wife, "or he that is heire of the dead, may have an ap- "peal for this murder or homicide before the "Conſtable and the Marſhall, whoſe ſentence is "upon *teſtimony of witneſſes*, or *combat*; and ac- "cordingly, where a ſubject of the King was ſlaine "in Scotland by others of the King's ſubjects, "the wife of the dead had her appeale therefore "before the Conſtable and the Marſhall." Sir Edward Coke adds, "And ſo it was reſolved, "in the reigne of Queen Elizabeth, in the caſe of "Sir Francis Drake, who ſtrook off the head of "Dowtie, *in partibus tranſmarinis*, that his bro- "ther and heire might have an appeal. Sed Re- "gina noluit conſtituere Conſtabularium Angliæ, "&c. et ideo dormivit appellum."

The latter part of the above ſentence ſhews, that, in that particular period, there was no Conſtable of England; and the fact is, that this office, which,

"ſaid that it ſhall be tryed by the certificate of the Mar- "ſhall of the King's hoſt in writing, under his ſeal, which "ſhall be ſent to the juſtices." *Coke upon Littleton, lib. 3. cap. 3. § 102.*

which, in early times, was hereditary in certain families, and deſcendible even to the huſbands of females, had ceaſed to be ſo in the reign of Henry VIII. on the attainder of Edward Stafford Duke of Buckingham, executed for high treaſon in 1521; nor was there afterwards any permanent office of Conſtable in England; the King, from that time forward, only iſſuing his commiſſion occaſionally for the creation of a High Conſtable for the particular purpoſe of judging in certain high crimes of ſtate; and even this occaſional appointment has, in the latter reigns, been ſuperſeded by the nomination of Lords High Stewards for the trial of ſtate offences. The laſt commiſſion of High Conſtable was iſſued by King Charles I. in 1631, upon an appeal of treaſon brought by Donald Lord Rae, a Scottiſh Baron, againſt David Ramſay, Eſquire, for certain treaſonable words and purpoſes of hoſtility towards the King and covenant, which, as no witneſſes were preſent at the converſation when they were ſpoken, Ramſay poſitively denied, and offered to clear himſelf to the Court of Chivalry, either by combat, or as the court ſhould appoint. The King's commiſſion *, after appointing Robert Earl of Lindſay to be High Conſtable, bears, that he, together with the Earl of Arundel, Marſhal of England, ſhall "hear,

* Ruſhworth's Coll. part 2. vol. 1. p. 112.

" decide, and bring to final ſentence this cauſe, " and do therein according to the law and cuſtom " of arms and the uſage of the *Military Court* of " England." Theſe, with ten others of the officers of ſtate and principal nobility, likewiſe commiſſioned by the King, formed the Court of Chivalry, and they began, by pronouncing a ſolemn judgment, declaring the crimes charged by the proſecutor againſt the priſoner to amount to high treaſon. The Earl Marſhal then ſet forth, that the court were legally competent to decide this cauſe, like any other of his Majeſty's courts of juſtice, by the ordinary proof of witneſſes; but that, ſeeing it appeared from the tenor of the accuſation and defence, that this mode of proof was impoſſible, as the words were ſpoken in private converſation between the parties, no other iſſue remained for them but by way of public duel. The parties having thrown down their gloves in token of aſſent to this propoſition, the High Conſtable put the appeal into one glove and the anſwer into the other, and folding them together, adjudged, in the name of the bleſſed Trinity, the ſaid Lord Rae and David Ramſay to decide their difference by duel, on the 12th day of April 1631, between ſun and ſun, in Tuttlefields, Weſtminſter, in the preſence of the King. This duel, however, was not fought: the King, on more mature reflection, judging this mode of trial a remnant of barbariſm,

barbariſm, thought fit to recal his commiſſion, and to bind the parties by their ſureties to attempt nothing hoſtile againſt each other, or contrary to the public peace.

On the abolition of the Conſtable's hereditary juriſdiction, which, as we have obſerved, took place after the attainder of Stafford Duke of Buckingham, and the vacancy that enſued in that office, unleſs when there were occaſional appointments by the King, it became a queſtion, Whether the Marſhal of England, (whoſe office ſtill continued to be hereditary), and who, it was allowed, had a joint juriſdiction with the Conſtable while the latter office exiſted, could exerciſe, during the vacancies of that office, the whole powers belonging to the Court of Chivalry. This queſtion was much agitated, and received at different times oppoſite determinations: for in the reign of James I. the queſtion being referred to the judgment of the Lord Keeper, the Maſter of the Rolls, and other Lords of the Privy Council, they gave a ſolemn opinion, that the Earl Marſhal had all the powers of judicature without the High Conſtable, during the vacancy of that office; and on report of this to the King, his Majeſty iſſued his commiſſion to Thomas Earl of Arundel, then hereditary Earl Marſhal; which, after reciting that the Earl Marſhal had delayed to proceed in ſome cauſes on account of doubts of his authority, contains the following

following ſtrong declaration of his judicial power. "We hold it fit, (ſays the King), in a caſe of ſo "great weight, to proceed with extraordinary de- "liberation; and having now, both by ourſelf "and the whole body of our council, received "ample ſatisfaction, by many and clear proofs, "that the Conſtable and Marſhal were joint "judges together, and ſeveral in the vacancy of "either, we do hereby authoriſe, will, and com- "mand you our Earl Marſhal, that from hence- "forth you proceed in all cauſes whatſoever "whereof the Court of Conſtable ought proper- "ly to take cognizance, as judicially and defini- "tively as any Conſtable or Marſhal of this "realm, either jointly or ſeverally, heretofore have "done." Yet in the ſubſequent reign of Charles I. and within a few years from this deliberate and explicit recognition of the Marſhal's juriſdiction independent of the Conſtable, the Lord Keeper and Judges of the King's Bench being conſulted on a like occaſion, viz. the before-mentioned appeal of treaſon by Lord Rae againſt Ramſay, gave a judgment directly contrary, and found, "that "the King muſt make a Conſtable, *durante be-* "*neplacito*; for the Marſhal could not take the "appeal without him *." In ſuch a ſtate of uncertainty with reſpect to the judicial powers of the Conſtable

* Ruſhworth's Coll. part 2. page 107.

Conſtable and Marſhal, it is no wonder that the juriſdiction of the Court of Arms or Chivalry, though never formally aboliſhed, ſhould have gone entirely into diſuſe: nor is this at all to be regretted; for its judicial powers in caſes of treaſon are certainly much better lodged in thoſe courts which determine according to the ſtatutory laws of the realm, and through the medium of a jury, than in any anomalous judicature not ſo regulated and reſtrained; and the trial of military crimes and delinquencies is repoſited much more ſafely, and with greater ſecurity to the liberties of the ſubject, in thoſe Courts-Martial whoſe procedure includes all the benefits of the trial by jury, while it is regulated by laws which have all the publicity of the ordinary ſtatutes of the realm.

N° III.

Warrant for holding a General Court-Martial, for the Trial of Lord George Sackville.

GEORGE R.

WHEREAS we were pleaſed, by our commiſſion, dated on the 31ſt day of October 1758, to appoint George Sackville, Eſq; commonly called Lord George Sackville, then a Lieutenant-General

General in our ſervice, to be Commander in Chief of all our Britiſh forces, as well horſe as foot, then ſerving on the Lower Rhine, in our army aſſembled or to be aſſembled there, under the command of our good Couſin Prince Ferdinand of Brunſwick, Commander in Chief of our ſaid army, enjoining and requiring him, the ſaid Lord George Sackville, to obey ſuch orders and directions as ſhould be given him by the ſaid Prince Ferdinand, or ſuch other perſon as might hereafter be Commander in Chief of our ſaid army, according to the Rules of War: AND WHEREAS we were pleaſed, by our inſtructions, under our ſign-manual, bearing date the ſame 31ſt day of October 1758, to direct the ſaid Lord George Sackville conſtantly to put in execution ſuch orders as he might receive from our ſaid good Couſin Prince Ferdinand of Brunſwick, or ſuch other perſon as might hereafter be Commander in Chief of our ſaid army, according to the Rules of War, with regard to marching, countermarching, attacking the enemy, and all operations whatſoever to be undertaken by our ſaid troops: AND WHEREAS we were informed that the ſaid Lord George Sackville hath diſobeyed the orders of the ſaid Prince Ferdinand; which charge we thinking fit ſhould be enquired into by a General Court-Martial, did, by our warrant, bearing date the 26th day of January laſt, order that

that a General Court-Martial ſhould be forthwith held upon that occaſion, which was to conſiſt of our truſty and well-beloved Richard Onſlow, Lieutenant-General of our forces, whom we did appoint to be Preſident thereof, and of our truſty and well-beloved Henry Pulteney, Sir Charles Howard, Knight of the Bath, John Huſke, John Campbell, our right truſty and well-beloved Counſellor John Lord De Lawarr, our truſty and well-beloved James Cholmondeley, James Stuart, our right truſty and well-beloved Couſin William Earl of Panmure, our truſty and well-beloved William Kerr, commonly called Earl of Ancram, our right truſty and well-beloved Couſin William Earl of Harrington, our truſty and well-beloved James Abercromby, our right truſty and well-beloved Couſin George Earl of Albemarle, our truſty and well-beloved Francis Leighton, Lieutenant-Generals;—our truſty and well-beloved Edward Carr, our right truſty and well-beloved Couſin Thomas Earl of Effingham, our truſty and well-beloved Robert Rich, and William Belford, Major-Generals of our forces;—all of whom, or the ſaid Preſident, together with any twelve or more of the ſaid officers, might conſtitute the ſaid General Court-Martial; which ſaid General Court-Martial hath met, but hath not yet examined any witneſſes: AND WHEREAS it hath been ſince repreſented, that the ſaid Preſident Lieutenant-General Rich-

ard Onſlow hath been taken ſuddenly ill, and is unable to attend: AND WHEREAS, if others of the ſaid members ſhould by unavoidable accidents be prevented from attending, there may not be a ſufficient number to compoſe a General Court-Martial, OUR WILL AND PLEASURE IS, and WE do hereby direct, that the General Court-Martial for the trial of the ſaid Lord George Sackville do conſiſt of our truſty and well-beloved Sir Charles Howard, Knight of the Bath, whom we do hereby appoint to be Preſident thereof; and of our truſty and well-beloved John Huſke, John Campbell, our right truſty and well-beloved Counſellor John Lord De Lawarr, our truſty and well-beloved James Cholmondeley, James Stuart, our right truſty and well-beloved Couſin William Earl of Panmure, our truſty and well-beloved William Kerr, commonly called Earl of Ancram, our right truſty and well-beloved Couſin William Earl of Harrington, our truſty and well-beloved James Abercromby, our right truſty and well-beloved Couſin George Earl of Albemarle, our truſty and well-beloved Francis Leighton, Robert Manners, Eſq; commonly called Lord Robert Manners, Lieutenant-Generals;—our truſty and well-beloved Edward Carr, our right truſty and well-beloved Couſin Thomas Earl of Eſſingham, our truſty and

and well-beloved Robert Bertie, Eſq; commonly called Lord Robert Bertie, and Julius Cæſar, Major-Generals of our forces;—all of whom, or the ſaid Lieutenant-General Sir Charles Howard Preſident, together with any twelve or more of the ſaid laſt mentioned officers, may conſtitute the ſaid General Court-Martial: AND you are to order the Provoſt-Marſhal General, or his Deputy, to give notice to the ſaid Preſident and officers, and all others whom it may concern, when and where the ſaid Court-Martial, hereby appointed, is to be held, and to ſummon ſuch witneſſes as ſhall be able to give teſtimony in this matter; the ſaid Provoſt-Marſhal General, and his Deputy, being hereby directed to obey your orders, and give attendance where it ſhall be requiſite. AND WE do further authoriſe and empower the ſaid Court-Martial, hereby appointed, to hear and examine all ſuch matters and informations as ſhall be brought before them, touching the charge aforeſaid, and proceed in the trial of the ſaid Lord George Sackville, and in giving of ſentence, according to the rules of military diſcipline; which ſaid ſentence you are to return to our Secretary at War, to be laid before us for our conſideration: AND for ſo doing this ſhall be, as well to you, as to the ſaid Court-Martial hereby appointed, and all others concerned, a ſufficient warrant.

Given at our Court at St James's, this 6th day of March 1760, in the 33d year of our reign.

By his Majesty's command,

HOLDERNESSE.

To Our Trusty and Well-beloved Thomas Morgan, Esq; Judge-Advocate-General of Our Forces, or his Deputy.

No IV.

Form of a Warrant of a Commander in Chief for holding a General Court-Martial, by General Commander of his Majesty's Forces, Castles, Forts, and Barracks, in North Britain.

BY virtue of the power and authority to me given and granted by his Majesty, I do hereby constitute and appoint you to be President of a general Court-Martial, to be held in Edinburgh Castle, on Monday the 20th instant: And the said general Court-Martial is hereby authorised to hear and examine, by oath or otherwise, all such matters and informations as shall be brought before them, touching certain

certain articles of charge brought againſt
Eſq; as Colonel of the
regiment of or any others
that it may be found neceſſary to be brought againſt any of the commiſſioned officers, quarter-maſters, non-commiſſioned officers, or ſoldiers belonging to the ſaid regiment, or to any other regiment; and to proceed in the trial of ſuch offenders; and to give judgment and ſentence thereupon, purſuant to an Act of parliament now in force, entitled, "An act for puniſhing mutiny "and deſertion, and for the better payment of the "army and their quarters." And for ſo doing, this order ſhall be, unto you, and all concerned, a ſufficient warrant and authority.

Given at Edinburgh, this day of
1797,

A. G. General.

By his Lordſhip's command,
A. M. D. Adj. General.

Major-General A. C.

No. V.

No V.

Warrant for holding a Court of Enquiry, iſſued by his late Majeſty George II. in 1757.

GEORGE R.

WHEREAS We were pleaſed in Auguſt laſt to ſend a number of our troops on an expedition againſt France, with orders and inſtructions to attempt, as far as ſhould be found practicable, a deſcent upon the French coaſt, at or near Rochefort, in order to attack, if practicable, and by a vigorous impreſſion force that place; and to burn and deſtroy, to the utmoſt of their power, all docks, magazines or arſenals, and ſhipping, that ſhould be found there, and to exert ſuch other efforts as ſhould be judged moſt proper for annoying the enemy, as by our ſeveral inſtructions to the commander of the ſaid forces does more fully appear: *And whereas* the troops ſent for theſe purpoſes have returned to Great Britain, no attempt having been made to land on the coaſt of France; concerning the cauſe of which failure we think it neceſſary that enquiry ſhould be made, by the General Officers hereafter mentioned, in order that they may report thoſe cauſes to us, for our better information: *Our will* and

pleaſure

pleaſure therefore is, and we do hereby nominate and appoint our right truſty and right entirely beloved Couſin and Counſellor Charles Duke of Marlborough, Lieutenant-General; and our truſty and well-beloved George Sackville, commonly called Lord George Sackville, and John Waldegrave, Major-Generals of our forces, to examine and enquire touching the matters aforeſaid: *And* you are to give notice to the ſaid General Officers, when and where they are to meet for the ſaid examination: *And* the ſaid General Officers are hereby directed to cauſe you to ſummon ſuch perſons, (whether the Generals or other officers employed on the expedition, or others), as are neceſſary to give information touching the ſaid matters, or as ſhall be deſired by thoſe who were employed on the expedition: And the ſaid General Officers are hereby further directed to hear ſuch perſons as ſhall give them information touching the ſame; and they are authoriſed, empowered, and required, ſtrictly to examine into the matters before mentioned, and to report a ſtate thereof, as it ſhall appear to them, together with their opinion thereon. All which you are to tranſmit to our Secretary at War, to be by him laid before us, for our conſideration; and for ſo doing, this ſhall be, as well to you, as to our ſaid General Officers, and all others concerned, a ſufficient warrant.

Given

Given at our Court at Kenſington, this 1ſt day of November 1757, in the 31ſt year of our reign.

BARRINGTON.

To our Truſty and Well-beloved Thomas Morgan, Eſq; Judge-Advocate General of our Forces, or his Deputy.

No VI.

Statute paſſed in Ireland, anno 1798, *for the Enactment of Martial Law, entitled,* "*An Act for the Suppreſſion of the Rebellion which ſtill unhappily exiſts within this Kingdom, (Ireland), and for the Protection of the Perſons and Properties of his Majeſty's faithful Subjects within the ſame.*"

WHEREAS a traitorous conſpiracy, for the ſubverſion of the authority of his Majeſty and the Parliament, and for the deſtruction of the eſtabliſhed conſtitution and government, hath unfortunately exiſted within this kingdom for a conſiderable time, and hath broken out in acts of the moſt daring and open rebellion:

And whereas his Excellency Earl Camden, then

then Lord Lieutenant General and General Governor of Ireland, did on the 30th of March 1798, by and with the advice of the Privy Council of this kingdom, iſſue his moſt direct and poſitive orders to the officers commanding his Majeſty's forces, to employ them with the utmoſt vigour and deciſion for the immediate ſuppreſſion of the ſaid rebellion, and did by his proclamation of the ſame date, by and with the advice of the Privy Council, notify the ſame:

And whereas notwithſtanding the ſaid orders, ſo iſſued as aforeſaid, the ſaid rebellion did very conſiderably extend itſelf, inſomuch that large bodies of armed traitors did openly array themſelves, and make the moſt daring and violent attacks upon his Majeſty's forces, and committed the moſt horrid exceſſes and cruelties on the properties and perſons of his Majeſty's loyal ſubjects:

And whereas, for the more effectual ſuppreſſion of the ſaid daring and unprovoked rebellion, his Excellency the ſaid Earl Camden did on the 24th of May 1798, by and with the advice of the Privy Council, iſſue his orders to all general officers commanding his Majeſty's forces, to puniſh all perſons acting, aiding, or in any manner aſſiſting in the ſaid rebellion, according to Martial law, either by death or otherwiſe, as to them ſhould ſeem expedient, for the puniſhment and ſuppreſſion of all rebels in their ſeveral diſtricts, and did by his

proclamation of the ſame date, by and with the advice of the Privy Council, notify the ſame:

And whereas his Excellency the ſaid Earl Camden did, by meſſage, duly communicate his ſaid orders and proclamations, notifying the ſame reſpectively to the Lords Spiritual and Temporal and Commons then in Parliament aſſembled, who did, by their addreſſes to his Excellency, expreſs their cordial acknowledgments for his ſaid meſſages, and their entire approbation of the deciſive meaſures ſo taken by his Excellency, by and with the advice of the Privy Council, however deeply they lamented the neceſſity by which they were dictated; and the ſaid Lords Spiritual and Temporal and Commons did, by their addreſſes, pledge their full engagement of ſupport of every meaſure of firmneſs and vigour which might be neceſſary for the ſpeedy and effectual ſuppreſſion of the ſaid rebellion:

And whereas by the wiſe and ſalutary exerciſe of his Majeſty's undoubted prerogative in executing Martial law for defeating and diſperſing ſuch armed and rebellious force, and in bringing divers rebels and traitors to puniſhment in the moſt ſpeedy and ſummary manner, the peace of this kingdom has been ſo far reſtored, as to permit the courſe of the common law partially to take place, but the ſaid rebellion ſtill continues to rage in very conſiderable parts of this kingdom, and to deſolate and lay waſte the country by the moſt ſavage and wanton

ton violence, exceſs, and outrage, and has utterly ſet at defiance the civil power, and ſtopped the ordinary courſe of juſtice and of the common law therein:

And whereas many perſons who have been guilty of the moſt daring and horrid acts of cruelty and outrage in furtherance and proſecution of the ſaid rebellion, and who have been taken by his Majeſty's forces employed for the ſuppreſſion of the ſame, have availed themſelves of ſuch partial reſtoration of the ordinary courſe of the common law to evade the puniſhment of their crimes, whereby it has become neceſſary for Parliament to interpoſe:

Be it therefore enacted by the King's Moſt Excellent Majeſty, by and with the advice and conſent of the Lords Spiritual and Temporal and Commons in this preſent Parliament aſſembled, and by the authority of the ſame, That, from and after the paſſing of this act, it ſhall and may be lawful to and for the Lord Lieutenant or other Chief Governor or Governors of this kingdom, from time to time during the continuance of the ſaid rebellion, whether the ordinary courts of juſtice ſhall or ſhall not at ſuch time be open, to iſſue his or their orders to all officers commanding his Majeſty's forces, and to all others whom he or they ſhall think fit to authoriſe in that behalf, to take the moſt vigorous and effectual meaſures for

ſuppreſſing the ſaid rebellion in any part of this kingdom which ſhall appear to be neceſſary for the public ſafety, and for the ſafety and protection of the perſons and properties of his Majeſty's peaceable and loyal ſubjects, and to puniſh all perſons acting, aiding, or in any manner aſſiſting in the ſaid rebellion, or maliciouſly attacking or injuring the perſons or properties of his Majeſty's loyal ſubjects in furtherance of the ſame, according to Martial law, either by death or otherwiſe, as to them ſhall ſeem expedient, for the puniſhment and ſuppreſſion of all rebels in their ſeveral diſtricts, and to arreſt and detain in cuſtody all perſons engaged in ſuch rebellion or ſuſpected thereof, and to cauſe all perſons ſo arreſted and detained in cuſtody to be brought to trial in a ſummary manner by Courts-Martial, to be aſſembled under ſuch authority, and to be conſtituted in ſuch manner and of ſuch deſcription of perſons, as the ſaid Lord Lieutenant or other Chief Governor or Governors ſhall from time to time direct, for all offences committed in furtherance of the ſaid rebellion, whether ſuch perſons ſhall have been taken in open arms againſt his Majeſty, or ſhall have been otherwiſe concerned in the ſaid rebellion, or in aiding or any manner aſſiſting the ſame, and to execute the ſentences of all ſuch Courts-Martial, whether of death or otherwiſe, and to do all other acts neceſſary for ſuch ſeveral purpoſes.

And

And be it enacted, That no act which ſhall be done in purſuance of any order which ſhall be ſo iſſued as aforeſaid, ſhall be queſtioned in his Majeſty's Court of King's Bench or in any other court of the common law. And in order to prevent any doubt which might ariſe, whether any act alleged to have been done in conformity to any orders ſo to be iſſued as aforeſaid was ſo done, it ſhall and may be lawful to and for the ſaid Lord Lieutenant or other Chief Governor or Governors, to declare ſuch acts to have been done in conformity to ſuch orders; and ſuch declaration, ſignified by any writing under the hand of ſuch Lord Lieutenant or other Chief Governor or Governors, ſhall be a ſufficient diſcharge and indemnity to all perſons concerned in any ſuch acts, and ſhall in all caſes be concluſive evidence that ſuch acts were done in conformity to ſuch orders.

And be it further enacted, That all officers, non-commiſſioned officers, and ſoldiers, who ſhall act under any ſuch orders as aforeſaid, ſhall be reſponſible for all things which ſhall be done under ſuch orders to ſuch Courts-Martial only by which they ſhall be liable to be tried for any offence againſt the Articles of War, under any act then in force for ſuch purpoſes; and ſuch Courts-Martial ſhall have full and excluſive cognizance of all matters and things which ſhall be objected againſt ſuch officers, non-commiſſioned officers, and

and ſoldiers reſpectively, and all proceedings ſhall be had thereon, in the ſame manner as for offences againſt the Articles of War, and not otherwiſe; and the Court of King's Bench, or any other court of juſtice, civil or criminal, ſhall not take cognizance of any act, matter or thing which ſhall be done by any ſuch officer, non-commiſſioned officer, or ſoldier, in purſuance of this Act; and if any proceeding ſhall be had in any ſuch court againſt any ſuch officer, non-commiſſioned officer, or ſoldier, for any ſuch act, matter, or thing, by indictment, action, or otherwiſe, all ſuch proceedings ſhall be ſtayed by ſummary order, on application to the court wherein they ſhall be had.

And be it enacted, That if any perſon who ſhall be detained in cuſtody under the powers created by this act ſhall ſue forth a writ of Habeas corpus, it ſhall be good and ſufficient return to ſuch writ, that the party ſuing forth the ſame is detained by virtue of a warrant under the hand and ſeal of ſome officer or other perſon duly authoriſed by the Chief Governor or Chief Governors for the time being to iſſue ſuch warrant under the authority of this act.

Provided nevertheleſs, That the name of ſuch officer or other perſon ſo authoriſed as aforeſaid to iſſue ſuch warrant, ſhall have been previouſly notified by the Chief Governor or Governors, or his

his or their Chief Secretary, to the Court of King's Bench, by writing, ſigned by the ſaid Chief Governor or Chief Governors, or his or their Chief Secretary, and ſignifying to the ſaid court that ſuch perſon or perſons was or were ſo authoriſed as aforeſaid to exerciſe the powers ſpecified by this act; and when ſuch return ſhall be made, it ſhall not be neceſſary to bring up the body of the perſon who is ſo detained.

Provided always, and be it declared and enacted, That nothing in this act contained ſhall be conſtrued to take away, abridge, or diminiſh the acknowledged prerogative of his Majeſty for the public ſafety to reſort to the exerciſe of Martial law againſt open enemies or traitors, or any powers by law veſted in the ſaid Lord Lieutenant or Chief Governor or Governors of this kingdom, with or without the advice of his Majeſty's Privy Council, or of any other perſon or perſons whomſoever, to ſuppreſs treaſon and rebellion, and to do any act warranted by law for that purpoſe, in the ſame manner as if this act had never been made, or in any manner to call in queſtion any acts heretofore done for the like purpoſes.

And be it enacted, That this act ſhall continue and be of force until the firſt day of the next ſeſſion of Parliament, and for two months after the ſaid day, and no longer: And that it ſhall and may be lawful to repeal, amend, or alter this act during this ſeſſion of Parliament.

INDEX.

INDEX.

A

ACCESSORIES amenable to trial for Military crimes, 188
——— to mutiny, 191
——— to miſbehaviour, &c. 192
——— to deſertion, 193
——— to challenges, 196
——— Principals and acceſſories may be tried at the ſame time, 200
——— A perſon acquitted as an acceſſory may be tried as a principal, 201
Accuſation or Charges, 209, *et ſeq.* *See Charges.*
Agitators, their meaſures of reform, 91
——— quelled by Cromwell, 93
Aliens, in what caſe ſubject to Military law, 126
American troops regulated by the Britiſh Mutiny-act and Articles of War, 123
Appeal from a regimental to a general Court-Martial, 186, 337
——— When competent, 338
——— How limited, *ibid.*
——— Form of procedure in trials of, 343
——— Sentences pronounced on appeal muſt be reported like the ordinary ſentences of a general Court-Martial, 344
Armour, ſtatutes of, abrogated in the reign of James I. 57
Army new modelled by Cromwell, 89
Arraignment, incidents to, 238

Array, commiſſioners of, 37. Appendix, No. 1.
Arreſt previous to trial, 202
——— Nature and degrees, 205
——— Arreſt at large, *ib.*
——— Time of confinement limited by the Articles of War, 206
——— Penalty of breach of, 208
Articles of War, Sovereign empowered to enact them, 6, 113
——— The puniſhments which they decree can only be inflicted through the medium of a Court-Martial, 9
Artillery officers and ſoldiers ſubject to Military law, 133
Aſſize of arms, 36, Appendix, No. 1.

B

Behaviour, ſcandalous or infamous, a Military crime, 215
——— Muſt be clearly ſpecified, 216
Breach of arreſt, penalty for, 208
Brevet officers ſubject to the Military law, 129

C

Caſhiering of an officer, 322
Challenging of jurors on a Court-Martial, 224
——— Cauſes of, *ibid. et ſeq.*
Challenges ſending and receiving, 196
——— Acceſſories thereto, *ibid.*
Charles I. progreſs of the Military law in his reign, 59
Charles II. the Military power of the Crown ſolemnly recogniſed at the Reſtoration, 102
Charges or indictment before a Court-Martial, 211
——— Muſt ſpecify clearly the act or acts of crime, 212
——— Muſt ſpecify the time and place, 218

Charges need not ſpecify the Articles of War infringed, 220
—— Copy of them muſt be furniſhed to the priſoner in due time, 221
—— Cannot be altered after they are before the court, *ibid.*
Chivalry, Court of, 40, Appendix, No. II.
Civil power gives its aid to the Military, and is aided by it in its turn, 163, *et ſeq.*
Coat and conduct money, an ancient ſubſidy levied by the Crown, 68
Confeſſing the crime, its conſequence is ſentence, 242
Conſeil de Guerre, nature of, 334, Note
Conſtables Court, 40, Appendix, No. II.—Its juriſdiction limited, 43.—Its decline, 44
Counſel, if allowed in a Court-Martial, 253
—— Their duty, 255
Corporal puniſhments, 324
Courts-Martial, their authority, 113
—— His Majeſty empowered by law to conſtitute them, 115
—— Their powers limited in general, by the Mutiny-act and Articles of War, 117
—— Under what warrant they are aſſembled, 134, 144
—— Number of the members of, 139
—— Nine members muſt concur in every capital ſentence, 140
—— Quality, of the members of, 141
—— Preſident of the Court 141
—— The court ſubſiſts till formally diſſolved, 145

Courts-Martial, whether the court can judge as to its own competence, 146
——— Muſt exhauſt the whole charges, 147
——— But may exerciſe their judgment on the relevancy of theſe, 149
——— Precedence among the members of the Court, 150
——— Time of ſitting, 152
——— Advantages of the mode of trial by Court-Martial, *ibid.*
——— The votes of the majority are deciſive, 154
——— The youngeſt member gives his opinion and vote firſt, 156
——— The evidence is all taken down in writing, *ibid.*
——— The Court may adjourn from time to time, 157
——— Its ſentences are ſubject to review and prohibition, 167
Cromwell, Oliver, his meaſures for poſſeſſing himſelf of the Military power, 87
——— His vigorous enforcement of Military diſcipline, 90
——— Quells the mutinous ſpirit of the army, 92
——— Suppreſſes the levellers, 93

D

Death, ſentence of, 319
Declaration of rights, 108, 375
Degrading of non-commiſſioned officers, 324
Deſertion, Principal and Acceſſories to that crime, 193
Deſerters, harbouring of, 194
——— May be apprehended by the Civil power, 203
——— Gaolers intitled to receive the full ſubſiſtence of, 204

Diſcretionary power of puniſhment belonging to a Court-Martial, 320, 322
Diſorderly behaviour in a Court-Martial puniſhable, 223

E.

Eaſt-India Company, its Army ſubject to Parliamentary regulation, 122
Elizabeth, Queen, vigorous exertions of the Military Law in her reign, 55
Endowments for the benefit of Soldiers, 5, Note.
Enliſtment confers the Military Character, 119
Enquiry, Courts of, 346
—— Members of, diſqualified from ſitting on trials by Court-Martial of the ſame crime, 227
—— Form of appointment of, Appendix, No. V.
—— Advantages of, 349.
Evidence, its definition, 262
—— of two kinds, *viva voce* or parole, and written, 263
—— General Rules relative to, 263, *et ſeq.*
—— Parole, 269
—— Who are diſqualified from giving, 270, *et ſeq.*
—— Written, public and private, 293
—— All evidence muſt be taken down in writing, 251
—— Weighing of evidence, 298

F

Feudal Syſtem, a Military Eſtabliſhment, 32
Form of Trial in Courts-Martial, *See Courts-Martial.*

Half-pay

H.

Half-pay officers ſubject to the Military Law, 120
Harbouring and concealing deſerters, 194
Hearſay, no proper evidence, 303
High Court of Juſtice inſtituted by Cromwell, 95
Honour, the characteriſtic of the Military order, 2
Hotham, Sir John, tried by Court-Martial, 81

I

James I. Conſtitution of England approaching to an abſolute Monarchy in his reign, 56
——— Aboliſhes the ſtatutes of Armour, 57
James II. Martial Law rigorouſly executed in his reign, 107
Idiots cannot be witneſſes, 292
Immunities enjoyed by ſoldiers, 5
Impriſonment in order to trial, 202
——— Time of, limited by the Articles of War, 206
——— Names of priſoners to be returned to the commanding officer, 207
Infamous perſons cannot be witneſſes, 284
Infants cannot be witneſſes, 292
Intereſt in the cauſe diſqualifies from giving evidence, 278
Interpreters ſometimes neceſſary in trials, 241
Judge-Advocate, the proſecutor in name of the King, 209, 356
——— His duty and functions, 356
——— Informs the court in queſtions of law, or judicial practice, 357
——— Bound to give his opinion when it is demanded, or when it is neceſſary, 361
——— To what extent he is bound to aſſiſt the priſoner in his defence, 362

Judge-

Judge-Advocate muſt arrange all matters preparatory to the trial, 365
——— Muſt ſummon the witneſſes, 366
——— His duty as Recorder of the Court, 368
——— Ought to preſerve the original minutes of the proceedings of Courts-Martial, 371
Juriſdiction, objections to, 247

L

L'Eſtrange, Mr, tried by Court-Martial, 83
Levellers, their meaſures of reform, 93
Loughborough, Lord Chancellor, his opinion on what is properly termed Martial Law, 24

M

Magna Charta, 34
——— Did not aboliſh Military ſervice, 35
Marſhal of England, 41, Appendix, No. II.
Martial Law, inſtances of its uſe and abuſe in former periods of our hiſtory, 52, *et ſeq*,
——— improperly characteriſed by Sir William Blackſtone, 14, *et ſeq*.
——— It does not exiſt in the Britiſh dominions in the ſenſe deſcribed by that author, 24
——— An extenſion of it is neceſſary in times of danger to the State, 51, 376
——— Aboliſhed altogether in the time of Charles I. 66
——— Conſequences of its abolition, 68, *et ſeq*.
——— It was the paramount law of the State in the time of Cromwell, 96
——— Rigorouſly executed in the reign of James II. 107
——— It forms a part of the law of the land, 113, 372
——— See Military Law.
Mary of England, her arbitrary extenſion of the Martial Law, 54

Members of Parliament, whether ſubject to Military trial, 129
Mercy, Royal prerogative of, 135, 175
Military Law, its foundation, 1, 15
——— Its riſe and progreſs, 31, *et ſeq.*
——— Who are ſubject to it, 119
——— Does not interfere with the Civil, 157, 373
——— But is required to give it aid, 159
——— Condition, the peculiarities that attend it, 5, 7
——— Juriſdictions in time of Cromwell, 98
——— Offences, within what time they muſt be proſecuted, 164
——— Power of the Crown recognized at the Reſtoration, 102, 111
——— Service by Knight's fee, 35
Militia, power over it aſſumed by Parliament in the time of Charles I. 74
——— Regulated by Act 26th George III. c. 107
——— Officers and ſoldiers of, ſubject to the Mutiny Act in certain caſes, 125
——— Courts-Martial cannot be compoſed jointly of Militia and other officers, 125
Mutiny Act framed by Parliament, 7, 17
——— The firſt regular Act, 110
——— It is annually renewed by Parliament, 113
——— If it ſhould expire during the ſitting of a Court-Martial, 137
——— Acceſſories to the crime of, 193

O

Oaths taken by the members of a General Court-Martial, 231
—— Taken by the Judge-Advocate, 233

Oaths are to be adminiſtered only once, 235
Opinion, queſtions of, how far admiſſible, 304

P

Pardon, a plea in bar of trial, 246
——— Conditional, 177
Pardoning, the Crown's power of, 175
Parliament aſſumes the military power in the time of Charles I. 70
——— Privileges of, whether they affect military juriſdiction, 129
Particeps criminis, whether he can give evidence, 277
Pay, receiving it confers the military character, 119
Peremptory challenges not allowed in Courts-Martial, 225
Perjury in a witneſs puniſhable by a Court-Martial, 313
——— Subornation of, 314
Petition of right, 63
Pleas in bar of trial, 245
Preliminaries to trial before Courts-Martial, 188
Preſident of a General Court-Martial, 141
Preſumptive evidence, 299
Principals and acceſſories, 188
Privileges of Parliament, whether they affect military juriſdiction, 129
——— Belonging to the military claſs of men, 5
Probability in the weighing of evidence, 298
Proceedings of the trial muſt be taken down in writing, 184
——— Muſt be read over to the court before ſentence, 315
——— Muſt be tranſmitted to the Judge-Advocate General, 370

Proceedings, party tried entitled to a copy of them, 370
Profecutor in trials before a Court-Martial, 209
——— Public and private, 210
——— Whether he can give evidence, 271
Protectorate, fee Cromwell.
Puniſhments, the chief military, 319

Q

Quakers cannot give teſtimony in criminal ſuits, 291
Quelling frays, all officers have authority to do ſo, 197
——— Neglect of this duty puniſhable, 199

R

Regimental Courts-Martial, 180
——— Members of, 181
——— Have no Judge-Advocate, 183
——— Proceedings of, 184
——— Sentence of, 185
——— No commiſſioned officers amenable to trial before, 186
——— Appeal from the ſentences of, 337
Regulations for the army make part of the Military Law, 116
Relation to a party diſqualifies from giving evidence, 278
Reply allowed to the profecutor, 257
Reprimand to an officer, public and private, 323
Reſtoration, 100
——— The Military power of the Crown ſolemnly recognized at that period, 102
Review of the ſentences of Courts-Martial, 135, 167, 171
Reviſal of ſentences, 173, 345

Right,

Right, petition of, its tenor with reſpect to the Military Law, 6
Rights, declaration of, 375

S

Salus Populi ſuprema lex, 159, 374
Self-denying ordinance, 85
Sentence of a Court-Martial, form of pronouncing, 315, 317
——— General obſervations on, 329
——— May be either general or ſpecial, 331
——— Does not direct the mode of the puniſhment, 334
——— Incomplete till approved of by the ſupreme authority, 173, 345
Sovereign, his power in the regulation of the army, 6, *et ſeq.*
Standing army in time of Cromwell, 98
——— It owes its exiſtence at preſent to the will of Parliament, 111
——— Mute on trial, 239
Subornation of perjury, 314
Suſpenſion from rank and pay, 323
——— Whether it prevents the operation of Military Law on the perſon ſuſpended, 131
——— Of the laws by the joint authority of the King and Parliament, 375

T

Tenures, Military, aboliſhed at the Reſtoration, 101
Trial before a Court-Martial muſt be public, 223
——— Form and procedure of, 298, *et ſeq.*
——— Preliminaries to, 188
——— See Court-Martial.

W

Warrant for holding a General Court-Martial, 222. Appendix, Nos. III. & IV.
Wincheſter, ſtatute of, 38
Witneſſes, how ſworn, 250
——— Not permitted to read their evidence, but may uſe notes, 25
——— Muſt be ſeparately examined, 252
——— Muſt be ſworn and depoſe in preſence of the court, 311
——— It is competent to eſtabliſh their credibility by new evidence, 257
——— Who may be witneſſes, 269, *et ſeq.*
——— Witneſs not obliged to accuſe himſelf, 288
——— In what degrees credible, 300
——— Muſt ſhew their cauſe of knowledge, 302
——— How they are to be ſummoned, 309
——— If entitled to their charges, 310
——— Objections to the competency of, muſt be ſtated in open court, and deliberated on with ſhut doors, 312
——— See Evidence.

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